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Supreme Court of the United States

October Term, 1959

No. 35

Hector Sobrino, Jr., Et Ux.,
Appellants,

—v.—

West Haven Housing Authority,
Appellee.

APPEAL FROM THE APPELLATE DIVISION OF THE CIRCUIT COURT OF THE STATE OF CONNECTICUT

FILED SEPTEMBER 14, 1959
PROBABLE JURISDICTION NOTED APRIL 4, 1960

Supreme Court of the United States

OCTOBER TERM, 1969

No. 81

RECTOR SIMMONS, JR., ET UX
Appellants,

—v.—

WEST HAVEN HOUSING AUTHORITY
Appellee.

APPEAL FROM THE APPELLATE DIVISION OF THE CIRCUIT COURT OF THE STATE OF CONNECTICUT

INDEX

	Page
Relevant Docket Entries	1
Writ, Summons and Complaint	2
Memorandum of decision, DiCenzo, George G., J., January 16, 1968	5
Judgment, January 16, 1968	7
Defendants' Appeal, January 17, 1968	9
Motion to waive surety bond on appeal, January 17, 1968	10
Exhibit A—Affidavit of Joanne S. Faulkner	11
Exhibit B—Financial Affidavit of Rector Simmons, Jr. and Rose Simmons	12
Objections to defendants' motion to waive surety bond on appeal	13

Page

Transcript of hearing on motion to waive Surety Bond, January 19, 1968 ... 14

Memorandum of decision on motion to waive surety bond on appeal ... 23

Motion to review ... 24

Exhibit 1—Answer by Defendants, appearing specially ... 27

Exhibit A—Notice to Quit ... 31

Exhibit B—Circular dated February 7, 1967 from Department of Housing and Urban Development, Don Hummel to Local Housing Authorities, etc. ... 32

Exhibit 2—Defendants' Trial Brief, January 9, 1968 ... 34

Exhibit 3—Memorandum of Decision, DiCenzo, George G., J. January 16, 1968 (copy) (omitted in printing) ... 53

Exhibit 4—Motion to waive surety bond on appeal, January 17, 1968 (copy) (omitted in printing) ... 53

Exhibit 5—Memorandum of decision on motion to waive surety bond on appeal (copy) (omitted in printing) ... 53

Motion to dismiss appeal, January 23, 1968 ... 54

Order re deposit of funds, DiCenzo, George G., J. February 29, 1968 ... 55

Opinion of Appellate Division, Jacobs, David H., J. ... 56

Judgment of Appellate Division ... 62

Motion to terminate stay of execution ... 63

Petition for certification by Supreme Court (excerpt)—Questions Presented ... 64

Supplementary judgment ... 65

Opinion of Appellate Division ... 66

Order denying certification, June 25, 1968 ... 70

Notice of appeal to the Supreme Court of the United States ... 71

Orders granting motion for leave to proceed in forma pauperis and noting probable jurisdiction ... 73

Relevant Docket Entries

Date	Docket Entries
7-24-67	Writ, summons and complaint
12-11-67	Answer & Special Defense
1-16-68	Judgment for Possession for Non-Payment of rent is entered. See Memo of Decision Di Cenzo J.
1-18-68	Defendant's Appeal—Receipt #8-04821
1-18-68	Motion to Waive Surety Bond on Appeal
1-19-68	Motion to Waive Surety Bond on Appeal denied, and finding made that appeal is taken for purposes of delay. See Memorandum of Decision. Di Cenzo J.
1-24-68	Motion to Review
1-25-68	Motion to Dismiss Appeal
2-28-68	Order from United States District Court re: $72.00 deposit
2-29-68	Order
3- 1-68	Judgment File, Appellate Division Opinion of Appellate Division
3-11-68	Notice of Petition for Certification
3-15-68	Motion to terminate stay of execution
3-21-68	Copy of Petition for Certification by Supreme Court
4-18-68	Supplementary Judgment, Appellate Division
4-18-68	Opinion of Appellate Division announced
6-28-68	Copy of Order Denying Certification dated 6-25-68 from Conn. Supreme Court
6-27-68	Notice of Appeal to the Supreme Court of the United States
7-26-68	Summary Process Execution filed and issued

TO THE SHERIFF OF THE COUNTY OF NEW HAVEN, HIS DEPUTY, OR ANY CONSTABLE OF THE TOWN OF WEST HAVEN, WITHIN SAID COUNTY, GREETING:

BY AUTHORITY OF THE STATE OF CONNECTICUT, you are hereby commanded to summon

RECTOR SIMMONS, JR. and

ROSE SIMMONS, husband and wife, both of the Town of West Haven, County of New Haven, State of Connecticut (Apartment #4-B, Building F-B. Spring Heights, Glade Street);

to appear before the Circuit Court to be held at West Haven in and for the Eighth Judicial Circuit on the fourth Tuesday of July, 1967, then and there to answer unto

THE WEST HAVEN HOUSING AUTHORITY, a municipal corporation, organized and existing under the laws of the State of Connecticut, with an office at 15 Glade Street, in the Town of West Haven, County of New Haven and State of Connecticut;

in a civil action wherein the plaintiff complains and says:

1. On November 1, 1966, the plaintiff made a written lease to the defendants for the term of one month, renewable for successive terms of one month each, at a monthly rental of $72.00, payable in advance on the first day of each month, of the premises known as Apartment No. 4-B, Building F-B. Spring Heights, Glade Street, West Haven, Connecticut.

2. The defendants entered into possession of said premises and have ever since continued in possession thereof.

3. The defendants fail to pay the installments of rent due on May 1, 1967, June 1, 1967, and July 1, 1967.

4. On July 12, 1967, the plaintiff caused notice to be served on the defendants to vacate said premises on or before July 18, 1967, in accordance with the provisions

of the statute, a copy of said notice being attached hereto.

5. Although the time designated in said notice for the defendants to quit possession of said premises has passed, the defendants still continue in possession thereof and refuse to vacate the same.

The plaintiff claims a judgment of possession of said premises.

Catherine C. Shepard, of the Town of West Haven, is hereby recognized in $70.00 to prosecute, etc.

Of this Writ, with your doings endorsed thereon, make due service and return.

Dated at West Haven, Connecticut, this 19th day of July, 1967.

/s/ Dennis J. Donahue, Jr.
DENNIS J. DONAHUE, JR.
Commissioner of the Superior Court

Please enter the appearance of Philbin, Donahue & Votto for the plaintiff.

STATE OF CONNECTICUT
COUNTY OF NEW HAVEN

SS: WEST HAVEN

JULY 19, 1967

WEST HAVEN HOUSING AUTHORITY

vs.

RECTOR SIMMONS, JR. AND ROSE SIMMONS

Then and there by virtue hereof, of this original writ, summons and complaint, I left with and in the hands of the within named defendant Rose Simmons and at the usual place of abode of the within named defendant Rector Simmons, Jr. at Apartment #4-B, Building F-B. Spring Heights, Glade Street, West Haven, Conn., a true and attested copy of the within original writ, summons and complaint with my endorsement thereon.

The within and foregoing is the original writ, summons and complaint with my doings thereon endorsed.

ATTEST:

/s/ Ralph Bernardo
RALPH BERNARDO
Deputy Sheriff
New Haven County

Fees:

Travel	$3.50
Copy	2.40
Service	.40
End	1.20
Total	$7.50

IN THE EIGHTH CIRCUIT COURT
AT EAST HAVEN, CONNECTICUT

CV 8-677-5985

WEST HAVEN HOUSING AUTHORITY

vs.

RECTOR SIMMONS JR. AND ROSE SIMMONS

MEMORANDUM OF DECISION—January 16, 1968

This is a summary process action commenced on July 19, 1967 where the plaintiff seeks a judgment of possession against the defendants for non-payment of rent. The word "summary" is defined in Ballentine and also in Webster to mean "short, concise, reduced into a narrow compass or into a few words." The record in this case clearly shows what can happen to a summary proceeding where the process is abused by dilatory tactics, defenses interposed to delay or obstruct the proceeding, and every effort made to delay a trial of the case on the merits.

The defendants filed a plea in abatement and appeared specially. The plaintiff demurred to this plea and the court (Kinmonth J.) sustained this demurrer on August 15, 1967.

Then on August 17, 1967 the defendants filed a motion for more specific statement and a motion for oyer. The plaintiff promptly complied, although it is logical and reasonable to assume that the defendants did have a copy of their lease and did have the notice to quit. Then when the plaintiff moved for a default for the defendants' failure to plead, the defendants objected and also interposed a demurrer. The court (Adorno J.) overruled the demurrer on October 2, 1967. Further motions were presented to the court (Sullivan J.) and to this court, and finally on December 4, 1967 this court ordered the defendants to file an answer within one week. The defendants complied with this order and the pleadings were closed on December 22, 1967. The case came to trial on its merits on January 9, 1968.

The credible evidence establishes a renewable monthly lease, and that the defendants are in possession. The service of a notice to quit is admitted. The evidence further establishes that rent in the amount of $72.00 per month in accordance with the terms of the lease has not been paid for the months of May, June and July of 1967. The evidence also establishes that no rent has been paid for any of the succeeding months of August, September, October, November and December of 1967.

The court finds the issues for the plaintiff, and accordingly a judgment for possession of the premises by plaintiff for non-payment of rent is entered.

/s/ DiCenzo J.

IN THE EIGHTH CIRCUIT COURT
HELD AT WEST HAVEN

CV 8-677-5985 AP

WEST HAVEN HOUSING AUTHORITY

vs.

RECTOR SIMMONS, JR., ROSE SIMMONS

Present Hon. George G. DiCenzo, Judge

JUDGMENT—January 16, 1968

This action, by writ and complaint dated July 19, 1967 claiming possession of certain leased premises in the City of West Haven therein described, to wit: Apartment #4-B, Building F-B, Spring Heights, Glade Street, West Haven, Connecticut, came to this Court on the 4th Tuesday of July, 1967 and thence to July 25, 1967 on which day the Defendants filed a Plea in Abatement to the same, and thence to August 4, 1967 on which day the Plaintiffs filed a Demurrer to Plea in Abatement and thence to August 15, 1967 when the parties appeared and were at issue to the Court on said Plea in Abatement and Demurrer as on file and the Court having heard the parties found the issues for the Plaintiff, (Kinmonth, J.) and thence to August 21, 1967 when the Defendants filed a Motion for Oyer which was granted with three days for compliance (Macdonald, J.) and a Motion for More Specific Statement and thence to August 23, 1967 when said Motion for More Specific Statement was granted by agreement of counsel with three days to comply (Macdonald, J.) and thence to August 24, 1967 when the Plaintiffs filed a Motion for Default for Failure to Plead and thence to August 28, 1967 when the Defendants filed Objections to Motion for Default for Failure to Plead and thence to September 11, 1967 when Motion for Default for Failure to Plead was denied and Objections to Motion for Default for Failure to Plead were sustained (Wise, J.); also on August 28, 1967 the Defendants filed

a Demurrer to the Complaint and thence to October 4, 1967 when the Demurrer was overruled (Adorno, J.) and thence to October 11, 1967 when Defendants appearing specially filed a Motion for Further Disclosure and Production and thence to October 23, 1967 when Objections to Motion for Further Disclosure and Production was filed by the Plaintiffs and thence to November 13, 1967 when the parties appeared and were at issue and item I of paragraph I was granted, the remaining items of paragraph I denied and paragraph II was denied on the Motion for Further Disclosure and Production filed by the Defendants (Sullivan, J.) and thence to November 21, 1967 when the Plaintiffs filed a Motion for Default for Failure to Plead, at said time Defendants filed a Motion for Non-Suit and thence to November 24, 1967 when Objections by the Defendants appearing specially to the Motion for Default for Failure to Plead and on said date the Plaintiffs filed Objections to Motion for Non-Suit and thence to December 4, 1967 when the parties appeared and were at issue on said Motions as on file and the Court having heard the parties denied the Plaintiffs Motion for Default for Failure to Plead, denied the Defendants Motion for Non-Suit, denied the Objections by the Defendants to the Motion for Default for Failure to Plead and sustained the Plaintiffs Objections to Motion for Non-Suit (DiCenzo, J.) and thence to the present time when the parties appeared and were at issue to the Court as on file.

The Court having heard the parties finds all the allegations in said complaint true.

Whereupon it is adjudged that the plaintiff recover possession of the said premises described in said complaint and recover costs taxed at

By the Court,

/s/ Serafino Ginnetti
Clerk of the Eighth Circuit Court

IN THE EIGHTH CIRCUIT COURT
AT WEST HAVEN

CV8-677-5985

WEST HAVEN HOUSING AUTHORITY

vs.

RECTOR SIMMONS ET UX

DEFENDANTS' APPEAL—January 17, 1968

The defendants hereby appeal to the appellate division of the circuit court from the judgment rendered herein and from the prior rulings of the court. The defendants (appellants) desire to have reviewed the court's conclusions upon the facts.

THE DEFENDANTS

By: /s/ Francis X. Dineen
Their Attorney

You, Grace Bosse, of New Haven, deemed by me to be of sufficient financial responsibility to pay any costs which may be adjudged against Rector Simmons, Jr., and Rose Simmons on their appeal in the above entitled action, as surety, acknowledge yourself to be bound to the West Haven Housing Authority, plaintiff in said action, in a recognizance in the sum of $75.00, that the said Rector Simmons, Jr., and Rose Simmons will prosecute the foregoing appeal to full effect and pay any costs for which judgment may be rendered against them.

Dated at New Haven this 17th day of January, 1968.

/s/ Francis X. Dineen
Commissioner of the Superior Court

I certify that the foregoing appeal was filed on 1-18-, 1968, and that the defendants have paid the entry and record fees.

/s/ Jerome H. Hyatt
Clerk of the Circuit Court
Eighth Circuit

Receipt #8-04821

(Certification: omitted in printing)

IN THE EIGHTH CIRCUIT COURT
AT WEST HAVEN

CV8-677-5985

WEST HAVEN HOUSING AUTHORITY

vs.

RECTOR SIMMONS ET UX.

MOTION TO WAIVE SURETY BOND ON APPEAL—
January 17, 1968

The defendants hereby move that the Court waive the provision of Section 52-542 Conn. Gen. Stat. that defendants post a bond with surety on appeal and that the Court accept a bond without surety, upon the following grounds:

1. The defendants are financially unable to post a bond with surety.
2. The defendants are unable to obtain a bond with surety unless they post full cash collateral. Annexed hereto as Exhibit A, is the affidavit of Joanne S. Faulkner attesting to this requirement.
3. The defendants are unable to post full cash collateral. Annexed hereto as Exhibit B is defendants' financial affidavit.
4. To require a bond with surety as a condition to defendants' appeal would violate the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States of America, as well as the provision of Article I, Section 10 of the Constitution of the State of Connecticut, which provides that justice shall not be sold.

WHEREFORE, the defendants request that in lieu of a bond with surety they be permitted to appeal upon a non-surety bond and upon depositing an amount equal to each months' rent as provided in the lease when it becomes due, in escrow with the New Haven Legal Assistance Association pending the disposition of this action.

THE DEFENDANTS

By: /s/ Francis X. Dineen
Their Attorney

[ORDER Omitted in printing]

[CERTIFICATION Omitted in printing]

EXHIBIT A TO MOTION TO WAIVE SURETY BOND ON APPEAL

EIGHTH CIRCUIT COURT AT WEST HAVEN

CV8-677-5985

WEST HAVEN HOUSING AUTHORITY

vs.

RECTOR SIMMONS, ET UX

AFFIDAVIT—January 17, 1968

Joanne S. Faulkner, being duly sworn, deposes and says:

1. I am an attorney on the staff of the New Haven Legal Assistance Association Inc.

2. In an effort to obtain a bond with surety so that defendants could prosecute an appeal in the above case, I contacted the following companies:

Golden, O'Neil & Gebhardt, Inc.
Thompson & Peck
Daniel E. Fitzsimons Agency
Dennant & Company of Connecticut, Inc.
Robert Jacobs
T. Harold Fitzsimmons
Herman & Rice

3. Only T. Harold Fitzsimmons and Herman & Price expressed a willingness to write such a bond, but each required as a condition thereto that the defendants post cash collateral for the full amount of said bond.

/s/ Joanne S. Faulkner

[Jurat Omitted in printing]

EXHIBIT B TO MOTION TO WAIVE SURETY BOND ON APPEAL

[Title Omitted]

FINANCIAL AFFIDAVIT—January 17, 1968

Rector Simmons, Jr. and Rose M. Simmons, being duly sworn, depose and say:

1. I live with my spouse and three children in Apartment 4-B, Building F-B, Spring Heights, Glade Street, West Haven.

2. The family's only income is $85 a week net from Mr. Simmons' job at Sears, Roebuck & Co.

3. The family's assets are as follows:

Checking account	$ .15
Savings account	2.00
1959 Chevrolet	100.00

4. The weekly expenses for the family, including the three children, are as follows:

Food	$ 40.00
Furniture payment (Louis Gallo)	10.00
Electricity	3.00
Gas for car	5.00
Life Insurance	9.00
Clothing	10.00
TOTAL	$ 77.00

5. The family's debts are as follows:

Louis Gallo (furniture)	$325.00
Bernard Conti, M.D.	172.00
Harry Conti, M.D.	65.00
Hospitals	200.00

West Haven Housing Auth. vs. Rector Simmons, Et Ux.
Financial Affidavit
Page 2

Borden's	48.00
Southern New England Telephone Co.	50.00
TOTAL	$860.00

/s/ Rector J. Simmons, Jr.
RECTOR SIMMONS, JR.

/s/ Rose M. Simmons
ROSE M. SIMMONS

Sworn to before me this 17th day of January, 1968.

/s/ Francis X. Dineen
Commissioner, Superior Court

IN THE EIGHTH CIRCUIT COURT
WEST HAVEN, CONNECTICUT

CV8-677-5985

[Title Omitted]

OBJECTIONS TO DEFENDANTS' MOTION TO WAIVE SURETY BOND ON APPEAL—January 19, 1968

The plaintiff hereby objects to defendants' Motion To Waive Surety Bond on Appeal because the granting of said Motion would be in direct contradiction to the mandate of 52-542 of the Connecticut General Statutes and would prejudice plaintiff's rights by compelling said plaintiff to proceed on appeal without adequate surety by defendant.

The Plaintiff
West Haven Housing Authority
By PHILBIN, DONAHUE AND VOTTO

/s/ E. Michael Heffernan

[ORDER Omitted in printing]

[CERTIFICATION Omitted in printing]

CIRCUIT COURT, EIGHTH CIRCUIT
AT WEST HAVEN, STATE OF CONNECTICUT

CV 8-677-5985

WEST HAVEN HOUSING AUTHORITY*

vs.

RECTOR SIMMONS JR. ET UX

TRANSCRIPT OF HEARING ON MOTION TO WAIVE SURETY BOND—January 19, 1968

BEFORE THE HONORABLE GEORGE G. DICENZO

APPEARANCES:

FOR THE PLAINTIFF

PHILBIN, DONAHUE & VOTTO, 415 Main Street, West Haven, Connecticut

By: JOHN PHILBIN, ESQ.

FOR THE DEFENDANT

FRANCIS X. DINEEN, 169 Church Street, New Haven, Connecticut

By: JOANN FAULKNER, Attorney at Law

* Motion to Waive Surety Bond on Appeal

Reported by:

STANLEY WILDER
Court Reporter

[fol. 2] MRS. FAULKNER: As your Honor is aware, Section 52-542—

THE COURT: Let's get on to the law. To begin with we have trouble in this Circuit finding the statute, but with Mr. Ginnetti's help I have before me the section of 1961, 52-542, do I have the right statute?

MRS. FAULKNER: This statute was amended in 1961, Public Act 509, section four.

THE COURT: Is that the one we are dealing with now?

MRS. FAULKNER: Yes, that is right.

THE COURT: That hasn't been changed since?

MRS. FAULKNER: Not in our book.

THE COURT: Go ahead then, we got the same book.

MRS. FAULKNER: Section 52-542 requires the defendant taking an appeal in an action of summary process to post a bond with surety. We have alleged in our motion that the defendants are financially unable to post a bond with surety. We have attached to the motion a financial affidavit signed by both defendants, and all I can say about the financial affidavit is that it is pitiful. They have no reserves and they owe over eight hundred dollars in debts. I myself inquired of several bonding companies whether they are willing to write a bond with surety in a summary process appeal. The only two companies which were willing to write such a bond told me they would have to have full cash collateral. I don't exactly know how much the full amount would be, but [fol. 3] certainly it would be a minimum of three hundred dollars, possibly a maximum of one thousand dollars.

THE COURT: The rent was eighty-two dollars a month—

MRS. FAULKNER: Seventy-two dollars a month, your Honor.

THE COURT: In how many months do you think you can process the appeal assuming that you do all the things your office does?

MRS. FAULKNER: Assuming everything and this is down speedily, probably come in three months.

THE COURT: Thereafter, I suppose you will want to take an appeal to the Supreme Court?

MRS. FAULKNER: If we didn't win, of course.

THE COURT: So how many more months would that be?

MRS. FAULKNER: I'm not sure your Honor, I never done that before.

THE COURT: Well it would certainly be at least three more months.

MRS. FAULKNER: I would think so.

THE COURT: Let me ask you this. You say in your motion, you offer in lieu of the bond, if I understand your motion correctly, the deposit of the monthly rent when it becomes due with the New Haven Legal Assistance Association. How can the Court control the New Haven Legal Assistance Association?

MRS. FAULKNER: In what way?

THE COURT: How can the Court know that Mr. [fol. 4] Tenant has failed to pay his rent at the certain time to the Legal Assistance Association. Your his counsel. How do we know—what control do we have over it? Whereas, assuming that I decide that I want to entertain the motion from the standpoint of a favorable decision, don't you think the clerk of the court should be the recipient of the escrow fund rather than the Legal Assistance Association? At least the clerk of the court on January 1, March 1, or February 1, if the rent isn't paid and the plaintiff should want an execution, the order can provide for an issue of execution. This is step number one. What do you say to that?

MRS. FAULKNER: That was our original thought. We didn't know whether the court had such a procedure.

THE COURT: There isn't, excepting by order of the Court. If I should decide this case, that it appears to have merit, after I hear the other side, that the alternative method of providing security should be established, it would seem to me that rather than the Legal Assistance Association that the clerk of the court should be the recipient of the rent.

MRS. FAULKNER: That would be perfectly acceptable.

MR. PHILBIN: May it please the Court, of course, I object strenously to this. I would point to the Court's memorandum in deciding the case, where the Court pointed out, quite rightly, that the record in this case clearly shows what the—

[fol. 5] THE COURT: Let me ask you this. I'm entirely satisfied that all these tactics are for purposes of

delay. I'm throughly and completely satisfied of that. I'm also throughly satisfied that under the terms of this statute, that's why I had asked if I had the right statute, that if it appears to the Court who tried the case that the appeal was taken for the purpose of delay then, of course, we can no longer withhold execution.

MR. PHILBIN: That's correct your Honor, as I understand it.

THE COURT: I am of the opinion, I am very frank to say, to me it clearly appears that this, all these steps are taken for the purpose of delay, perhaps successfully so, but nevertheless that's what my feeling is. I don't think execution should be delayed. Now, what do you say to that?

MRS. FAULKNER: Your Honor, may I state for the record that I do not think these actions are taken for the purpose of delay. We submitted to your Honor a twenty-seven page—

THE COURT: I spent a weekend studying that twenty-seven page memorandum.

MRS. FAULKNER: We think we have excellent position on the law. Our appeal is taken for the purpose of upholding the law of the State of Connecticut as we understand it to the tenement law.

THE COURT: That's your position, I understand. [fol. 6] To me it appears rather clear, especially that you assert now that this person is without any funds, and going to continue there and make no provisions for the back payment at all and section 52-546, among other things, also carries a provision that the payment that the Court might require shall include all rents unpaid prior to the period of stay. Now as far as that, in the event of a stay I'm thinking along these lines, that I should state, find as a fact, that the appeal is taken for the purpose of delay, but permit the defendants to post with the clerk of the court the rent as it becomes due provided the plaintiff decides not to request an execution. But my feeling is this, that if the plaintiff feels, and I want to hear them on this, if the plaintiff feels that they should request an execution upon my finding that the appeal is taken for the purpose of delay then I think I

would deny the motion. Now that's the way I'm thinking about the matter. What are your thoughts on that?

MR. PHILBIN: Again your Honor, we would request an execution. I think inasmuch as the defendant here has brought a motion which sound in equity I think both parties should be heard as far as the equitable disposition. First I should remind the Court that the West Haven Housing Authority is a nonprofit Federal Agency sponsored authority which provides housing for low income families. The defendant in this case has paid no [fol. 7] rent since last April. He remained in possession of the premises and there are people who are willing to pay the rent and equally as poor as the defendant in this matter. Further I point out that in order to meet the expenses the other tenants, who again are low income families, have to bear the burden of making up the rent that Mr. Simmons is not paying. During this period of time, I further point out to the Court, I can provide evidence to this effect, that Mr. Simmons has been far from an ideal tenant besides disregarding the payment of rent. He races his automobile up and down the street.

THE COURT: That's not before me. I'm only concerned in this case with the question of nonpayment of rent.

MR. PHILBIN: Again I would point out to the Court that Mr. Simmons during this period of time has for the most part been employed. It's my understanding that he has been constantly employed since last August. He has never tendered any rent or offered to tender any rent. Further, in paragraph four of the defendants motion, the Fourteenth Amendment of the Constitution of the United States is set forth. I would point out that under the equal protection and due process clause that the Housing Authority again is entitled to equal protection. I don't think they are obligated to provide free housing for this man for a period which I believe would stretch on for another year or longer. He has already [fol. 8] had the benefit of seven months without paying rent. I doubt very much that the Housing Authority will be able to collect the back rent because of the financial situation. I would again point out to the Court that the statute is provided in order—

THE COURT: Well the question of collecting back rent, that's a legal action, that's a legal claim that the Housing Authority has that they can exercise in another manner. The only question before me is the summary process statute. The objective of the statute is to accomplish this. It's a summary process action. This course is showing how unsummary it can be. It would seem to me that if the plaintiff asserts the right to an execution on the theory that the appeal is taken for the purpose of delay then, of course, I respect that position. I will quite likely deny the motion in its entirety. The thought to substitute the clerk of the court for the Legal Assistance Association came to me during lunch time when I was discussing this problem with the clerk, and he said what Mrs. Faulkner suggested, perhaps there is no machinery set up for this, but he suggested that perhaps the money could be deposited in the bonding account and then let out as the Court would order, but—all right, is there anything further than that either of you want to offer?

MRS. FAULKNER: Your Honor, may I urge upon you that if you grant our motion to have the defendants [fol. 9] deposit the rent in court the landlord will not be hurt any further by delay in this proceedings. He will be protected because the monthly rent will be deposited. If he is successful on appeal he will be able to get the rent.

THE COURT: Do you suggest, if that should be the conclusion, that the clerk could issue an execution upon failure to pay?

MRS. FAULKNER: Yes.

THE COURT: In other words, you will be willing to stipulate on behalf of your clients that if the rent were not paid that the clerk would, may be empowered forthwith to issue an execution?

MRS. FAULKNER: Yes, your Honor.

THE COURT: That appeal to you all right?

MR. PHILBIN: Frankly it doesn't. During this period of time, it could take a considerable period of time, even if the tenant pays the fund into the clerk's office, they are not available to the plaintiff and we are still

as a practical matter losing the rents during that period of time. Eventually if we prevail and get this money this would be an extended period of time.

THE COURT: If the motion is denied, of course, the defendant hasn't complied with the statute number one, if the Court makes a finding that the appeal is made for the purpose of delay, of course, that is a a finding [fol. 10] subject to appeal, then it would seem to me that the plaintiff—the defendant would have to attack the issuance of an execution, if you applied for one, wouldn't the plaintiff, either through injunctive proceedings.

MR. PHILBIN: I would think so your Honor, yes.

THE COURT: All right, anything further Mrs. Faulkner on behalf of your position?

MRS. FAULKNER: Does your Honor intend to make a decision this afternoon?

THE COURT: I am going to try to. I am going to give it some thought. I understand this is important to both of you and that's why I arranged this special two o'clock hearing. To me it's still a summary process action and speed is important if the objective of the law is to be carried out. I would hope to be able to decide it today unless you would have some reason why I should delay, if you want to offer something further.

MRS. FAULKNER: No, your Honor, but I would like to go back to your possible decision that we are proceeding just for the purpose of delay. I have stated that we are not proceeding for the purpose of delay.

THE COURT: You told me that. I'm satisfied that you are. I'm satisfied that all these monkey wrenches that are thrown in here have been successful so far and keeping them in there and not paying any rent. The [fol. 11] legislature must have had something in mind when it wrote here, "unless it appears to the Judge who tried the case that the appeal was taken for the purpose of delay." Now what did the legislature have in mind when it wrote that into the law?

MR. FAULKNER: I think it had in mind a frivolous appeal. I think we have several excellent issues which are backed up by the State of Connecticut.

THE COURT: There's one thing missing, that's good faith.

MRS. FAULKNER: I believe we have acted in good faith.

THE COURT: I'm not talking about you, I'm talking about your clients. I'm not talking about you or your office, I'm talking about the clients. You just sit back and review this for a minute. These people have made no effort to pay anybody anything in months, no token effort.

MRS. FAULKNER: Your Honor, they would have made an effort if these proceedings had been withdrawn.

THE COURT: They haven't even gone to anybody, here's something on account.

MRS. FAULKNER: Then I may point out in addition that my client suffered a nervous breakdown, was out of work—

THE COURT: The law doesn't provide for that.

MRS. FAULKNER: If you have particular reasons [fol. 12] why that's so I can answer that.

THE COURT: I set them all out in the memorandum of decision. I set most of them out. For example, let me illustrate. You filed a motion for oyer, Your client has a copy of the lease.

MRS. FAULKNER: Your Honor our clients did not have a copy of the lease and we did not have a copy of the lease. The first time we saw the lease was when the oyer was complied with.

THE COURT: Then you filed a request for a production of notice to quit. Your clients had a notice to quit, it was served on him.

MRS. FAULKNER: In order to plead to the notice to quit it had to be in the record. I don't know whether we had that or not.

THE COURT: Let's not debate it further. I am satisfied that the appeal is for the purpose of delay. I suspect I am going to make that finding. Now in the light of that I also suspect, I am going to review this a little more carefully, I also suspect I am going to deny it, your motion, as it is presently presented before me because I dont' think it's in compliance with the law,

and if the plaintiff asserts that they want to proceed to obtain an execution, if they can, then I won't give any further thought to the alternative plan of substituting the clerk for the Legal Assistance Association. Anything further?

[fol. 13] MR. PHILBIN: Your Honor, I think you inquired as whether or not we intended to pursue the opportunity to obtain—

THE COURT: You do?

MR. PHILBIN: We do your Honor.

THE COURT: Thank you.

MR. PHILBIN: I do not know whether or not this is an order, as the time to appeal has not—

THE COURT: Well this is a bit premature. Actually an appeal has been filed. Have you got a copy of it?

MR. PHILBIN: I have your Honor.

THE COURT: Defendants appeal was filed on the seventeenth and recorded by the clerk on the eighteenth, yesterday, so for all purposes there is an appeal, it has been filed.

THE CLERK: There is no bond.

THE COURT: But it has been filed nevertheless. Whether they can perfect their appeal as is is another story. As the matter stands now there is an appeal. This motion might be all right if I formally and when I formally deny their motion to substitute for the bond.

MR. PHILBIN: Very well your Honor.

[fol. 14] [Reporter's and Clerk's Certificate to foregoing transcript omitted in printing.]

IN THE EIGHTH CIRCUIT COURT
AT WEST HAVEN, CONNECTICUT

CV 8-677-5985

WEST HAVEN HOUSING AUTHORITY

vs.

RECTOR SIMMONS ET UX

MEMORANDUM OF DECISION ON MOTION TO WAIVE SURETY BOND ON APPEAL—January 19, 1968

By agreement of the parties and their counsel the Court assigned the defendants' motion to waive surety bond on appeal for a special hearing on January 19, 1968 at two p.m. at which time counsel appeared and were heard pro and con on the instant motion.

The Court makes the following finding:

1) the defendants have paid no rent since May 1, 1967, nor offered to pay any part of the rent due;

2) the record in the case is full of dilatory tactics, and is loaded with defenses interposed to delay and obstruct the summary process proceeding;

3) the instant motion is another effort to avoid the clear obligation required by Section 52-542 of the Connecticut General Statutes requiring the furnishing of a sufficient bond with surety to the plaintiff to answer for all rents that may accrue;

4) it clearly appears to this court, having tried this case, that this appeal is being taken for the purpose of delay.

Therefore, the motion to waive the requirements of Section 52-542 pertaining to a surety bond is denied.

/s/ DiCenzo
J.

IN THE EIGHTH CIRCUIT COURT
APPELLATE DIVISION

CV8-677-598 AP

[Title Omitted]

MOTION TO REVIEW—January 24, 1968

The defendants, Rector Simmons Jr., and Rose Simmons, through their attorney, hereby move this Court pursuant to sections 1023 and 693 of the Connecticut Practice Book, to review and vacate the action of the Eighth Circuit Court in denying the defendants' Motion to Waive Surety Bond on Appeal and in finding that it appears that the defendants' Appeal is being taken for the purpose of delay, and in support thereof, the defendants respectfully represent:

1. On January 16, 1968, after a trial to the Court, judgment of possession was rendered in this summary process action by the Eighth Circuit Court in favor of the plaintiff and against the defendants.

2. The defendants believe that they have valid defenses to this action, and the defendants wish an opportunity to be heard with respect to these defenses by the Appellate Division of the Circuit Court. The defendants listed seven (7) special defenses in their Answer. A copy of said answer is attached hereto and marked Exhibit 1. Six of said defenses were thoroughly briefed by the defendants, and a trial brief was submitted to the trial Court at the close of the trial. A copy of said trial brief is attached hereto and marked Exhibit 2.

3. No Reply Brief was filed by the plaintiff, and none of the said defenses was discussed or adverted to by the trial judge in his Memorandum of Decision. A copy of said Memorandum of Decision is attached hereto and marked Exhibit 3.

4. On January 18, 1968, the defendants filed their Appeal and a Motion to Waive Surety Bond on the Appeal. A copy of said Motion to Waive Surety Bond on the Appeal is attached hereto and marked Exhibit 4.

5. On January 19, 1968, the Eighth Circuit Court denied the defendants' Motion to Waive Surety Bond on Appeal and said Court made a finding that it appears that said Appeal is being taken for the purpose of delay. A copy of the Decision of the Court is attached hereto and marked Exhibit 5.

6. The defendants are indigent and they are unable to afford the price of a surety for a bond. The provision of Section 52-542 which requires a bond with surety as a condition to defendants' Appeal violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States of America, as well as the Provision of Article One (1), Section 10, of the Constitution of the State of Connecticut, which provides that justice shall not be sold.

7. With respect to the aforesaid finding that this Appeal is being taken for the purpose of delay, the defendants maintain that this Appeal is being taken to vindicate their rights and not for the purpose of delay. In addition, no hearing was held by the Eighth Circuit Court on the question of whether this Appeal was being taken for the purpose of delay.

8. There is no basis whatsoever in the record of the case to support the finding that the appeal of the plaintiffs herein is being taken for the purpose of delay and such a finding is arbitrary and unreasonable, and eviction of the defendants based on said finding would deprive them of liberty and property without due process of law and deny them the equal protection of the law guaranteed by the Fourteenth Amendment to the United States Constitution.

9. Defendants proved the essential allegations of their defenses. The allegations of fact in the First, Second, and Third Special Defenses were admitted by plaintiff. The following was established by uncontradicted testimony at trial:

> Fourth Special Defense: On April 24, 1967, plaintiff's executive director informed defendants that they were going to be evicted. Defendants relied on this statement in not tendering rent thereafter.

Defendants had never paid rent on the first of the month, and plaintiff complained only once.

Fifth Special Defense: Defendants' apartment is in a building "which is rented, leased, let or hired out to be occupied, or is arranged or designed to be occupied, or is occupied, as the home or residence of three or more families, living independently of each other, and doing their cooking upon the premises," and having a common right in the yards. The building is not more than three stories in height, is served by a sidewalk as the same main means of ingress and egress and is contained within firewalls. The only certificate of occupancy issued to plaintiff does not state that the building conforms in all respects to the requirements of the Tenement House Act.

Sixth Special Defense. Plaintiff did not demand of the defendants the rent, nonpayment of which was the basis of plaintiff's action.

10. The provision of Section 52-542, C.G.S.A., which permits the trial judge to terminate a stay of execution pending appeal, upon his finding that it appears that an appeal is taken for the purpose of delay, allows a trial judge the virtually unlimited and unreviewable discretion to prevent appellate review of any of his own rulings or decisions in a summary process proceeding and violates the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

THE DEFENDANTS

By: /s/ Francis X. Dineen
Their Attorney

[Order Omitted in printing]

[Certification Omitted in printing]

EXHIBIT 1 TO MOTION TO REVIEW

EIGHTH CIRCUIT COURT
AT WEST HAVEN

December 11, 1967

CV8-677-5985

WEST HAVEN HOUSING AUTHORITY

vs.

RECTOR SIMMONS ET UX

ANSWER BY THE DEFENDANTS, APPEARING SPECIALLY

The defendants herein, not waiving but expressly reserving all their objections to the jurisdiction and appearing specially, hereby answer the plaintiff's complaint:

1. So much of paragraph (1) as alleges a monthly rental in in the amount of $72.00 per month is denied, and the remainder of paragraph (1) is admitted.
2. Paragraph (2) is admitted.
3. Paragraph (3) is denied.
4. So much of paragraph (4) as alleges that on July 12, 1967 the plaintiff caused notice to be served on the defendants to vacate the premises on or before July 18, 1967 is admitted, and the remainder of paragraph (4) is denied.
5. Paragraph (5) is admitted.

FIRST SPECIAL DEFENSE

1. At the time of the commencement of this action there was, and there still is, another action docketed as CV8-676-5856 pending in this court between the same parties and demanding the same relief.
2. This Court, therefore, has no jurisdiction over this action.

SECOND SPECIAL DEFENSE

1. The writ, summons and Complaint, which were returnable on July 25, 1967, were not filed with the clerk of this court until July 24, 1967.

2. Section 52-48a of the General Statute requires that all process in the Circuit Court be returned to the clerk of said court at least three days before the return date of such process.

3. This court, therefore, has no jurisdiction over this action.

THIRD SPECIAL DEFENSE

1. Paragraph (2) of the lease between the plaintiff and the defendants provides that the lease may be terminated without cause provided that prior to the 15th day of any month written notice is given to terminate the lease on the last day of said month.

2. Paragraph (11) of the lease between the plaintiff and the defendants provides that if the tenant breaches any covenant of the lease, the lease may be terminated upon 30 days notice from the management.

3. The plaintiff has at no time given to the defendants the notice required by paragraph (2) of the lease or the notice required by paragraph (11) of the lease, and consequently the lease has not terminated.

FOURTH SPECIAL DEFENSE

1. There has been a rule and practice in effect between the plaintiff and its tenants, and in effect between the plaintiff and the defendant, whereby a reasonable period of time (to wit, approximately two weeks) after the first day of the month is allowed by the plaintiff for the payment of the monthly rent.

2. On May 8, 1967, the plaintiff caused to be served upon the defendants a notice to quit, dated May 5, 1967, notifying the defendants to quit possession of their apartment on or before May 16, 1967. A copy of said notice is attached hereto and marked, Exhibit A.

3. On June 5, 1967, the plaintiff caused to be served upon the defendants a writ, summons and complaint in

a summary process action setting forth that the aforesaid notice to quit had been served and demanding a judgment of possession of the defendants' apartment. Said action is now pending in this court and is docketed as No. CV8-676-5856.

4. The plaintiff by its acts of signing, issuing and serving upon the defendants the aforesaid notice to quit excused the defendants from paying rent for the month of May 1967 and for any subsequent month, until said notice is withdrawn, and by said acts the plaintiff waived all rights for the payment of rent for the month of May 1967 and for any subsequent month until said notice is withdrawn, and by said acts the plaintiff is estopped to assert that the defendants were obliged to pay rent for the month of May 1967 and for any subsequent month, until said notice is withdrawn, and because of said acts the defendants were not required to tender rent for the month of May 1967 or for any subsequent month, until said notice is withdrawn.

FIFTH SPECIAL DEFENSE

1. The premises known as "Building F-B, Glade Street, Spring Heights, West Haven, Connecticut, owned by the plaintiff and occupied by the defendants constitute a tenement house, or a portion thereof, as defined by Section 19-342 of the General Statutes of Connecticut.

2. Section 19-370 of the General Statutes of Connecticut provides that no tenement house shall be occupied for human habitation until the issuance of a certificate that such building conforms in all respects to the requirements of Chapter 352 of the General Statutes.

3. Section 19-371 of the General Statutes provides that if a tenement house is used for human habitation when it does not have the certificate described in paragraph (2) above, no rent shall be recoverable by the owner while there is no certificate, and no action or special proceedings shall be maintained therefore.

4. The plaintiff, therefore, cannot bring this action based on non-payment of rent as no rent was in fact due and owing to the plaintiff.

SIXTH SPECIAL DEFENSE

1. The plaintiff has never made demand for the rent from the defendants.
2. Such demand is a necessary condition precedent to the bringing of an action in summary process.
3. This action, therefore, cannot be maintained by the plaintiff.

SEVENTH SPECIAL DEFENSE

1. On or about February 7, 1967, the Department of Housing and Urban Development at Washington D.C. issued a letter regarding certain procedures to be followed by local housing authorities in the event of termination of tenancy. A copy of said letter is attached hereto and marked, Exhibit B.
2. Said letter and the rules contained therein applies to the West Haven Housing Authority and said rules and regulations are part of the rules and regulations referred to in the lease in this matter.
3. The plaintiff has failed to comply with said letter and the rules contained therein and therefore the plaintiff cannot maintain this summary process action at this time.

THE DEFENDANTS

By: .....
FRANCIS X. DINEEN
Their Attorney,
Appearing Specially

[Certification Omitted in printing]

EXHIBIT A TO ANSWER

Mr. & Mrs. Rector Simmons, Jr.
Apartment 4B—Bldg. F-B Spring Heights
West Haven, Connecticut

I hereby give you notice to quit possession of the house, land, building, apartments and premises, now occupied by you at Apt. 4B—Bldg. F-B, Spring Heights, in the City and Town of West Haven, State of Connecticut, on or before the 16th day of May, 1967.

Dated at West Haven, Conn. this 5th day of May, 1967.

West Haven Housing Authority

PHILBIN, DONAHUE & VOTTO
By /s/ John J. Donahue
Its attorneys

EXHIBIT B TO ANSWER

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
Washington, D. C. 20410

Office of the Assistant Secretary
For Renewal and Housing Assistance

Circular
2-7-67

TO: Local Housing Authorities
Assistant Regional Administrators for Housing Assistance
HAA Division and Branch Heads

FROM: Don Hummel

SUBJECT: Terminations of Tenancy in Low-Rent Projects

Within the past year increasing dissatisfaction has been expressed with eviction practices in public low-rent housing projects. During that period a number of suits have been filed throughout the United States generally challenging the right of a Local Authority to evict a tenant without advising him of the reasons for such eviction.

Since this is a federally assisted program, we believe it is essential that no tenant be given notice to vacate without being told by the Local Authority, in a private conference or other appropriate manner, the reasons for the eviction, and given an opportunity to make such reply or explanation as he may wish.

In addition to informing the tenant of the reason(s) for any proposed eviction action, from this date each Local Authority shall maintain a written record of every eviction from its federally assisted public housing. Such records are to be available for review from time to time by HUD representatives and shall contain the following information:

1. Name of tenant and identification of unit occupied.
2. Date of notice to vacate.
3. Specific reason(s) for notice to vacate. For example, if a tenant is being evicted because of undesirable actions, the record should detail the actions which resulted in the determination that eviction should be instituted.
4. Date and method of notifying tenant with summary of any conferences with tenant, including names of conference participants.
5. Date and description of final action taken.

The Circular on the above subject from the PHA Commissioner, dated May 31, 1966, is superseded by this Circular.

/s/ [Illegible]
Assistant Secertary for Renewal
and Housing Assistance

EXHIBIT 2 TO MOTION TO REVIEW

EIGHTH CIRCUIT COURT
AT WEST HAVEN

January 9, 1968

No. CV8-677-5985

WEST HAVEN HOUSING AUTHORITY

vs.

RECTOR SIMMONS, JR., AND ROSE SIMMONS

DEFENDANTS' TRIAL BRIEF

I. Statement of Facts

This is a summary process action where the plaintiff seeks a judgment of possession against the defendants for the stated reason of non-payment of rent. The defendants claim both that the plaintiff has no substantive right to bring this action and that even if it did have such a right, it has not followed the correct procedure and, therefore, it ought not to be given judgment.

This action was commenced on July 19, 1967, by the service of the Writ on the defendants. This Writ was returnable on the fourth Tuesday of July, 1967, (July 25, 1967) but the plaintiff did not return the original writ, summons and complaint to the clerk until July 24, 1967. The defendants contend that this late return violated the provisions of Section 52-48a CGS and that, therefore, this action was not properly commenced.

Another summary process action was then, and still is, pending in this court between the parties hereto. The defendants therefore filed a timely plea in abatement and a special appearance dated July 25, 1967, based on the prior action between the parties, and on the late return of the writ. The plaintiff demurred to this plea on August 3, 1967, (the dates here given are the dates of the pleadings, not the dates of filing) and the matter was heard on August 9, 1967, before Kinmonth, J., who

treating the demurrer as an answer, sustained the demurrer. To preserve its right to appeal the defendants have since appeared specially, reserving the right to contest the jurisdiction further.

On August 22, 1967, plaintiff filed, in response to defendant's motion for oyer, a copy of the lease, and on August 23, 1967, it filed a copy of the notice to quit. On August 25, 1967, the defendants demurred to the complaint on the grounds that the lease, filed in response to the oyer of the defendants, revealed that by its own terms it could be terminated by not less than 30-days notice for the breach of a covenant therein while the notice to quit filed in response to the motion for a more specific statement showed that only five days notice had in fact been given.

On September 29, 1967, the demurrer was heard before Adorno, J. It was overruled on October 2, 1967, on the grounds that the notice to quit was a valid termination of the lease, notwithstanding its terms. The defendants take issue with this view, and they renew their defense here.

On August 25, 1967, the defendants filed a motion for disclosure and production. This was based on paragraph (12) of the lease which incorporates therein by reference certain conditions of occupancy and rules and regulations. This motion was granted by the clerk on August 28, 1967. Plaintiff failed to comply with this motion, although it did file an untimely objection. On December 4, 1967, DiCenzo, J., stated that he would not require compliance with this disclosure.

On October 10, 1967, the defendant moved for further disclosure and production as to whether plaintiff had obtained the tenement house certificate of occupancy required by Section 19-370 C.G.S. The plaintiff objected to this motion on October 20, 1967, and its objections were heard on November 13, 1967, before Sullivan, J., who sustained the plaintiffs objections in part and overruled them in part. The plaintiff filed a certificate of occupancy issued under Section 19-400 C.G.S., but failed to comply with the order of the court. On November 17, 1967, the defendants moved to nonsuit the plaintiff for

non-compliance with this order and with the disclosure order of August 28, 1967.

On December 4, 1967, the court, by DiCenzo, J., denied the defendants' motion, accepted an oral compliance with Judge Sullivan's order, and ordered the defendants to file an answer within one week. On December 11, 1967, the defendants complied with this order, and on December 22, 1967, the plaintiff closed the pleadings by making a reply to the answer.

II. Argument

A. *The Pendency of a Prior Action in the Same Court Between the Same Parties and Demanding the Same Relief Requires the Court to Abate the Second Action*

The law in Connecticut on this matter is simple and directly on point:

> Where the parties are the same and the second suit is for the same matter, cause or thing, or the same object is to be attained, as in the first suit and in the same jurisdiction, the second shall abate and is dismissed.
>
> *Hatch* v. *Spofford*, 22 Conn. 485, 495, (1853).

There are some recent exceptions to the general rule, all based on the principle that the collection of debts should be allowed to proceed by all proper means. See *Brochin* v. *Conn. Importing Co.*, 137 Conn. 350 (1950); *Cole* v. *The Associated Construction Co.*, 141 Conn. 49 (1954).

There is no doubt that CV8-676-5856 is in the same court, or that it involves the same parties, or that it involves the same relief sought by the plaintiff. The situation fits precisely within the rule stated in *Hatch* v. *Spofford*, supra.

The prior action is based on the claim that the defendants, by committing a nuisance on May 1, 1967, breached the lease and on May 8, 1967, the plaintiff caused that lease to be terminated by serving a notice to quit upon the defendants. The present action is based on the claim

that on May 1, 1967, as well as June 1, 1967, and July 1, 1967, the defendants failed to pay the rent due. To this the defendants would make three comments:

1. The only cause of action in summary process is that the lease has terminated, for whatever reason. §§ 52-532 C.G.S. "The necessary and only basis of a summary process proceeding is that the lease has terminated." *Webb* v. *Ambler*, 125 Conn. 543, 550 (1939).

2. The plaintiff's cause of action in each case arose on May 1, 1967. There was no excuse for the plaintiff not including this cause of action in his earlier writ. In July, when the plaintiff commenced this action, it was open for it to move to amend its original complaint, yet it did not do so.

3. If the first action is sustained, then the second is unnecessary and it was brought for the purpose of harassing the defendants through the use of multiple law suits.

It should be noted at this point that plaintiff demurred to the plea in abatement, in effect challenging the propriety of such a plea. On argument, however, the plaintiff entirely abandoned this contention, as it must. There can be no question that an action may properly be abated where there is a prior action in the same court between the same parties for the same cause of action. Connecticut Practice Book, Form 250 (1963); Kaye & Moller, P.B. Ann. 156 (1966); Stephenson, Conn. Civ. Prac. § 78 (a) 1959.

This action, therefore, should have been abated, and the Court has no jurisdiction to proceed in it further.

B. *The Court Has No Jurisdiction of This Action Since Plaintiff's Writ Was Not Timely Returned.*

Plaintiff's writ was returnable to the Court on July 25, 1967, but was not actually returned to the clerk's office until July 24, 1967, in violation of § 52-48a C.G.S.

The defendants admit that the only reported case on the subject, *Fresdall* v. *Thomen*, 2 Conn. Cir. 109 (18 Cir. 1963), is directly against this contention. Nevertheless, the ruling is not binding on this Court and the

defendants respectfully submit that it is based on an incorrect reading of § 52-48a C.G.S. once the legislative intent is taken into account.

The statute in question reads as follows:

> Process in all civil actions, except summary process actions, brought to the circuit court shall be made returnable on any Tuesday in any month and all such process shall be made returnable within 60 days after the date of such process. Such process shall be served at least six days before the return day and returned to the clerk of the court at least three days before such date. The return day in any summary process action may be any weekday, Monday through Saturday, except a holiday.

Section 52-48a, C.G.S. Section 52-532 modifies this section as to summary process by providing that the complaint may "be made returnable six days, inclusive, after service on the defendant."

Prior to the creation of the circuit court summary process actions were tried by the trial justices. In those courts process was served six days, inclusive, before the return day, Section 52-46 Conn. Gen. Stat. (1949 rev.) and was returned to the court "at least 24 hours before the opening of court on the return day." Section 52-47 Conn. Gen. Stat. (1949 rev.) Parenthetically, it should be noted that plaintiff did not even comply with this 24 hour requirement in returning its writ.

When the circuit court was given jurisdiction of summary process actions, the provision for return to the clerk at least 24 hours before the opening of court on the return day was repealed and § 52-48a was added.

Thus, the only provision for return to the court of process in civil actions is that found in § 52-48a, "Such process shall be . . . returned to the clerk of the court at least three days before such date."

In reading the language of Section 52-48a it is not clear whether the three-day return of process requirement applies to summary process. Although summary process is specifically excluded in the beginning of the first sentence, the words "all such process" later on in the sen-

tence would seem to bring it back for the following provisions. Otherwise, the words "all such process" would be superfluous and unnecessary. It is a standard rule of statutory interpretation that an exclusionary provision should be read as narrowly as possible.

In support of this position, William Moller, in his commentary on Connecticut Civil Practice in Vol. 24 Conn. Gen. Stat. Ann. states: "most actions follow the normal process of service and return. The most notable exception is the process of eviction known as summary process. This action can be returned to the Circuit Court on any day, Monday through Saturday, *as long as the six day requirement and three day requirement of service and return is followed* (52-48a)." (Emphasis added.) Conn. Gen. Stat. Ann. Vol 24, p xvii.

The three day requirement serves the purpose of orderly procedure. If the plaintiff need not return the writ, summons and complaint in a summary process action to the clerk three days before the return date, the defendant might not have time to properly plead in abatement. Conn. Prac. Book § 76 (1963).

The plea in abatement may be of vital importance to the defendant's rights. Thus if it were desired to show improper service by the sheriff a plea in abatement would be in order. But the facts of improper service might not appear save on the writ returned to the clerk, and if such return were made after the time for a plea in abatement had passed, or even shortly before that point, a valid defense might be lost.

Since summary process is narrowly construed and strictly followed, *Jo-Mark Sand & Gravel Co.* v. *Pantanella*, 139 Conn. 598, 601 (1953), and since the three-day return of process requirement replaced the old 24-hour requirement of Section 52-47, this Court should have abated this action and this Court has no jurisdiction to proceed in it further.

C. *The Lease for the Premises in Question Has Never Been Terminated, and Therefore Summary Process Is Not Available.*

A lease is a contract. *Cohn* v. *Fennelly*, 138 Conn. 474, 476 (1952). The Supreme Court of Connecticut has stated:

> In construing it, three elementary principles must be kept constantly in mind: (1) The intention of the parties is controlling and must be gathered from the language of the lease in the light of the circumstances surrounding the parties at the execution of the instrument; (2) the language must be given its ordinary meaning unless a technical or special meaning is clearly intended; (3) the lease must be construed as a whole and in such a manner as to give effect to every provision, if reasonably possible.
>
> *Ingalls* v. *Roger Smith Hotels Corp.*, 143 Conn. 1, 6 (1955).

Furthermore, the court there stated that "if the language is ambiguous, the construction which favors the lessee should be adopted." *Ibid.*, See also *Conn. Land & Mort. Co.* v. *Lesser*, 136 Conn. 580, 583 (1950).

Using these principles of construction, it becomes clear that the lease involved in this case does not, in any case or under any permissible construction, give to the plaintiff the right to terminate the defendants' estate on five days notice. The plaintiff, under the lease that it drafted, reserved the power to terminate the lease only in the following circumstances:

1— Paragraph (2) of the lease provides that either party may terminate the lease as of the last day of any month, if notice is given to the other party before the fifteenth day of that month.

2— Paragraph (3) of the lease provides that if the size of the tenant's family shall change in such a manner as to warrant either a larger or a smaller dwelling unit, and if the tenant accepts the lessor's offer of such a unit, the lease shall terminate in thirty days.

3— Paragraph (4) of the lease provides that the tenant's failure to notify the management and obtain permission for additional persons to live there shall be cause for the termination of the lease.

4— Paragraph (5) provides that if the tenant's income exceeds the maximum standard of income eligible for public housing, then management may terminate the lease and the tenant be forced to vacate after six months.

5— Paragraph (8) provides that if the premises are so damaged by fire as to be untenantable, the lease will automatically terminate.

6— Paragraph (11) of the lease provides that "in the event that the tenant does misrepresent or has misrepresented any material fact in his application, or in any statement submitted to Management as required by Paragraph (8) [*sic*, should probably be Paragraph (9)] herein, or *if the Tenant breaches any covenant of this Lease*, this Lease may be terminated upon thirty (30) day's notice from the Management. . . ."

The agreement of the tenant to pay rent is one of the fundamental covenants of the landlord-tenant relationship. In two paragraphs of the lease the tenant agrees to pay rent. Paragraph (7) provides that "the Tenant is to pay the rent at Management offices on the first day of each month. . . ." Paragraph (9) contains the statement "the Tenant agrees to pay rentals in compliance with the 'Schedule of Dwelling Rents' adopted by Management." Thus, it would appear that if the tenant were to default in the payment of his rent, the landlord would have the remedy he agreed upon in Paragraph (11): the termination of the lease on thirty days notice.

The plaintiff, however, admits that it did not comply with the provisions of Paragraph (11). If, therefore, the lease has been terminated, it must have been under some other provision of the lease or under a provision of law permitting the termination of the lease.

The plaintiff has admitted that it did not comply with Paragraph (2) in its purported termination. Paragraphs (3), (4), (5) and (8) are by their terms completely irrelevant to the case.

No provision of law permits the termination of a lease for non-payment where the lease does not so provide. Only where the lease so provides, may it be terminated for non-payment. *Macha* v. *Eastern Conn. Training School*, 24 Conn. Sup. 151 (1962).

The law was aptly stated in *Bowman* v. *Foot*, 29 Conn. 331, 337 (1860).

> Our statute of summary process recognizes no other termination of leases than such as is effected by force of the contract itself. It supersedes none of the common law remedies of the landlord, except in respect of the notice to quit and the form of procedure by action. It follows that the question whether the tenants rights have ceased, must be settled according to a common law interpretation of the instrument of demise. In some states, precise legal consequences are annexed by statute to the non-payment of rent, and the lessee is arbitrarily divested of his estate. Our statutes contain no such provision.

and in *In re Edgewood Park Jr. College, Inc.*, 123 Conn. 74, 77 (1937)

> Apart from statute or express provisions of the lease, the tenants' non-payment of the rent or other breach of covenant will not justify his eviction by the landlord.

A stipulation terminating the lease for non-payment, to be effective, must be clearly and expressly stated. *Davidson* v. *Poli*, 102 Conn. 692, 695 (1925); *Rosa* v. *Cristina*, 135 Conn. 364 (1949). This rule goes back to the case of *Lang* v. *Young*, 34 Conn. 526, 529 (1868) where the Court said:

> The lease must expire "by reason of some express stipulation thereof," is the language of the statute, not by inference, not by operation of law, but by the express stipulation of the parties that the lease shall expire or become void on the non-fulfillment of the condition.

The lease must have terminated by such a clear and express stipulation in order to make summary process

available. *Davidson* v. *Poli*, 102 Conn. 692, 695 (1925); *Rosa* v. *Cristina*, 135 Conn. 364, 367 (1949); *Lang* v. *Young*, 34 Conn. 526, 528 (1828); *Jo-Mark Sand & Gravel Co.* v. *Pantanella*, 139 Conn. 598 (1953); *Feneck* v. *Nowakowski*, 146 Conn. 434, 436 (1959); *Webb* v. *Ambler*, 125 Conn. 543, 550 (1939); *Fortuna, Inc.* v. *Lyons*, 23 Conn. Sup. 389 (1962). There is no such clear or express provision here permitting termination for non-payment of rent.

The ruling of the Court, Adorno, J., on the demurrer found in Paragraph (7) of the lease authority to terminate the lease for the non-payment of rent. It is respectfully submitted to the Court that this ruling was in error.

The trial judge is not bound by the ruling made on a demurrer in the same case. *Albrecht* v. *Rubinstein*, 135 Conn. 243 (1948); *Santoro* v. *Kleinberger*, 115 Conn. 631 (1932). Upon trial the question is presented to the court for a new hearing on the law, as well as for a first hearing on the facts.

Paragraph (7) is divided by a semi-colon into two parts. The first states that the tenant shall pay the rent at the Management offices on the first day of each month, without requiring a statement or a notice therefor. The second part states that the tenant agrees to "pay when billed, for any damage done to the premises . . . which charges are hereby designated as additional rent, for default in payment of which the Management shall be entitled to all remedies for non-payment of rent."

The court on the demurrer felt that this meant that if *any* rent were unpaid, then, despite Paragraph (11), the plaintiff could issue a five day notice to quit under section 52-532 Conn. Gen. Stat. But it is submitted that the only proper interpretation of this provision is that the cost of repairs will be considered as rent, and therefore subject to the covenants of the first part of Paragraph (7) and of Paragraph (9), and that if the cost of damages, as rent, is not paid, then the landlord may proceed under Paragraph (11), or any other paragraph applicable, to terminate the lease and then to proceed under the summary process statute.

Even if there is an ambiguity in Paragraph (7), the ambiguity must be resolved in favor of the tenant, under the rule of *Inqualls* v. *Roger Smith Hotels Corp.*, 143 Conn. 1, 6 (1955).

Plaintiff is a public housing authority operating in the State of Connecticut. It must be presumed to know the law of this State, that non-payment is not grounds for termination of the lease unless the lease clearly and expressly so stipulates. Its failure to include such a stipulation is indicative of its intent not to have the benefit thereof.

Plaintiff's tenants are low-income people who have difficulty in relocating. Plaintiff may have omitted the non-payment stipulation to avoid imposing on its tenants the hardship of having to move on the short notice possible where non-payment is stipulated as ground for termination.

The lease has not been terminated in any way according to its own terms, and is still in full force and effect. The action of summary process, therefore, will not lie in this case.

D. *The Plaintiff Has Waived Its Right to Claim Non-Payment of Rent for the Months in Question, or It Has Become Estopped to Do So.*

The legal question posed by this defense is whether a plaintiff landlord who first serves a notice to quit possession and then commences and maintains a summary process action based on the termination of the lease will be allowed to bring, while the first action is pending, a second summary process action based on the supposed non-payment of rent after the first action was begun.

It should be emphasized that the question is not whether the lease was actually terminated by the first notice to quit, but whether the plaintiff by his actions either has waived his right to demand rent and bring an action for its non-payment or has become estopped from claiming that rent is due.

If the tenant breaches a covenant in a lease the landlord has the option of declaring the lease at an end by his unequivocal act. *Macha* v. *Eastern Conn. Training School*, 24 Conn. Sup. 151 (App. Div. Cir. Ct. 1962).

One way in which he may exericse his privilege of terminating the lease is by serving upon the tenant a notice calling upon the tenant to quit possession. § 52-53 Conn. Gen. Stat. A written lease may waive this notice to quit, but then the landlord must still take some affirmative and unmistakable action to end the tenancy. § 52-533 Conn. Gen. Stat.; *Macha* v. *Eastern Conn. Training School, supra.*

The landlord is not required to terminate the lease on a breach of it by the tenant, for it is within his discretion to waive any deviance from its terms. *Sun Oil Co.* v. *Keane*, 2 Conn. Cir. 524 (App. Div. Cir. Ct. 1964). The tenant, on the other hand, must abide by the landlord's election. Thus, if the breach is waived, the lease will continue, and rent will be due under its terms. However, if the lease is terminated, then the landlord, by his actions, has agreed to release the tenant from his obligations in exchange for the termination of the lease relationship. *Feneck* v. *Nowakowski*, 146 Conn. 434 (1959); *Welk* v. *Bidwell*, 136 Conn. 603 (1950). In the first case the obligation to pay rent continues, but in the second it is suspended and in its place is substituted the obligation to pay reasonable and occupancy for the actual time that the premises were occupied. *Welk* v. *Bidwell*, supra; § 47-22 Conn. Gen. Stat.

The landlord, as has been stated before, is the one who is able to decide whether the lease is to be terminated, and the tenant's legal rights are profoundly affected by this decision. However, the landlord should not be able to place the tenant in the situation where the landlord can alternatively claim that the lease is terminated and that it is not terminated. The law does not look with favor upon the one who is at the same time both asserting and denying the existance of a legal relationship. This, however, is exactly what the plaintiff is claiming here. On May 8, 1967 the plaintiff elected to serve defendants with a notice to quit possession. The question here is not whether that notice to quit was valid or effective to terminate, but whether, plaintiff by serving that notice waived tenants' obligation to pay rent or is estopped from proceeding in non-payment.

The defendants being entitled to rely upon the plaintiff's action in serving the notice, did not pay the rent they thought was not due, and now the plaintiff is trying to hold that non-payment against them in the present action. The plaintiff here should be held to have waived the payment of rent subsequent to May 8, 1967, and it should be estopped from claiming in this action that there was rent due under the lease when in CV8-676-5856 it indicated its clear intention not to accept further rent. The tenant is entitled to reply upon the landlord's unequivocal action aimed at terminating the lease, and is not obligated to tender rent thereafter.

Plaintiff, by serving the notice to quit on May 8, 1967, intentionally and unequivocally expressed its intention not to receive rent from the tenant.

Landlords intention to refuse rent, whether expressed by words or deeds, relieves defendant from performing the futile act of producing rent. *Arsenault* v. *General Electric Co.*, 21 Conn. Sup. 98, 100 (1958), aff'd, 147 Conn. 130; *Buonocore* v. *De Feo*, 76 Conn. 705, 706 (1903); *Ashburn* v. *Poulter*, 35 Conn. 553, 556 (1869); *Sands* v. *Lyon*, 18 Conn. 18, 25 (1846).

Where landlord indicates it will not receive the rent, it may not later evict tenant for non-payment.

> The landlord's refusal to receive the rent excused the tenant from an actual production of the amount due and barred the landlord's right to claim a forfeiture on the basis of nonpayment of rent.

Mayron's Bake Shops, Inc. vs. *Arrow Stores, Inc.*, 149 Conn. 149, 156 (1961). See also *Webb* v. *Ambler*, 125 Conn. 548, 3552 (1939); *Barnum* v. *Keeler*, 33 Conn, 209 (1866).

The notice to quit served on May 8, 1967, waived tenants obligation to pay the rent which became due for May 1967. Defendants will prove that plaintiff has established a practice of accepting rent without objection within a period of two weeks after the first day of the month. By statute, reasonable time for late payment of rent in the case of an oral lease is a period of nine days. 47-23 Connecticut General Statutes.

Plaintiff served its notice to quit before the time had expired in which it had customarily accepted payment. By practice plaintiff had waived the obligation to pay rent on the first of the month.

> If the lessor, having for a long time accepted rent paid thus tardily, suddenly decided to insist upon the letter of the lease as to payment, it should, in fairness, have notified the lessee of such intention.

Seaboard Oil Co. v. *Williamson*, 1 Conn. Sup. 47, 56 (1935).

The time in which plaintiff customarily accepted payment of rent without objection had not expired when the May 8 notice to quit was served. Plaintiff expressed its unequivocal intention not to accept rent before the payment had become overdue, and, under the cases cited above, has waived its right to insist on the payment of May rent or any rent thereafter. *Sun Oil* v. *Keane*, 2 Conn. Cir. 524, 530 (1964); *Fort Orange Barbering Co.* v. *New Haven Hotel Co.*, 92 Conn. 144, 149 (1917); *Seaboard Oil Co.* vs. *Williamson*, 1 Conn. Sup. 47, 56 (1935).

E. *There Was, and Is, No Rent Due and Owing to the Plaintiff From the Defendants for the Reason That the Plaintiff Has Not Obtained a Tenement House Certificate (Section 19-370 Conn. Gen. Stat.) for the Premises in Question, and Therefore This Action Based on Non-Payment of Rent Cannot Be Brought.*

The Tenement House Act, chapter 352 Conn. Gen. Stat., §§ 19-342 *et seq.*, sets forth certain minimum standards for health and safety. To show compliance with these standards a certificate of compliance, (§ 19-370 C.G.S.), is to be issued by a proper officer, (§ 19-373 C.G.S.). If a building meets the definition of a tenement house (§ 19-342 C.G.S.), and it does not have a certificate, then sections 19-370 and 19-371 C.G.S. make occupation of that building "unlawful". The owner is then subject to a penalty (§ 19-374 C.G.S.) and there is a further provision that:

> If any building constructed as, or altered into, a tenement house is occupied in whole or in part for human habitation in violation of the provisions of section 19-370, *during such unlawful occupation no rent shall be recoverable by the owner or lessee of such premises for such period and no action or special proceedings shall be maintained therefor.* Section 19-371 Conn. Gen. Stat. (emphasis added).

It should be noted that both "no rent shall be recoverable" *and* "no action or special proceeding shall be maintained therefor". The defendants contend that, first, this suit may not be brought because it is, in effect, an action or special proceeding for rent, and, secondly, that even if this suit may be brought, it cannot succeed, as there was never any rent lawfully due and owing the plaintiffs.

The first question, however, is whether the premises in question are subject to the provisions of the tenement house act. The premises will be subject to the act if they meet the definition of either section 19-342 Conn. Gen. Stat. or the definition of "garden apartment" under section 19-393 Conn. Gen. Stat., as garden apartments are subject to the provisions of the tenement house act by the provisions of section 19-394 Conn. Gen. Stat. It is the contention of the defendants that the premises, in fact, meet the definitional requirements of both sections.

The definition in section 19-342 Conn. Gen. Stat. provides that the following elements are necessary to make a tenement house:

1. A house or building
2. Which is rented, leased, or let out to be occupied

or

3. As the home or residence
4. Of three or more families
5. Living independantly of each other
6. And doing their cooking upon the premises
7. And having a common right in the halls, starways or yards.

The definition in section 19-393 Conn. Gen. Stat. established these requirements for a garden apartment project:

1. a multiple housing project
2. laid out on one plot
3. with walk-up apartments
4. in buildings not more than three stories in height.
5. containing separate living units
6. for three or more families
7. such units consisting of several apartments under the same roof
8. served by the same main means of ingress and egress
9. and contained within firewalls.

The defendants will submit evidence proving each element, and will prove that plaintiff has no tenement house certificate of occupancy, § 19-370, 19-375 Conn. Gen. Stat.

The plaintiff may not bring this action for eviction as it is prohibited by the statute. The words "no action or special proceedings" are broad enough to encompass an action in summary process for non-payment of rent. This does not, it should be emphasized, mean that the plaintiff cannot bring any summary process action, and therefore is never able to evict the tenant, but it merely means that he cannot use the grounds of nonpayment of rent as his basis in that suit.

The Appellate Division of this Court, as recently as March, 1967, approved an injunction of a summary process eviction for nonpayment where there was no tenement house certificate of occupancy. *Dreamy Hollow Apartments Corp.* v. *Lewis*, 4 Conn. Cir. 355, 232 A. 2d 346, 350 (1967).

Summary process evictions for non-payment differ from other evictions in several respects. Section 52-532 Conn. Gen. Stat. authorizes the use of a five day notice to quit possession rather than the usual ten day notice. Likewise, section 52-543 Conn. Gen. Stat. denies the tenant against whom judgment has gone for the reason of non-payment of rent the usual twenty day stay of execution, and section 52-546 Conn. Gen. Stat. prohibits

the court from granting that tenant a stay of execution for up to six months.

By prohibiting actions or special proceedings for non-payment of rent where there is no tenement house certificate, the statute deprives landlord of these special advantages. The purpose of the statute is to penalize the landlord into conforming his property. It would be against the public policy of this state for the courts to aid him in removing a tenant who is, in the last analysis, acting as the agent of the state in enforcing the law, in order to replace him with one who will pay him the rent that he has no right to and that he is, in fact, unlawfully collecting.

In any event, the effect of the law is to deny the landlord the right to collect rent on account of his own actions. *Loftus* v. *Second Nat. Bank of New Haven*, 121 Conn. 454 (1936); *Smith* v. *Dreamy Hollow Apts.*, 150 Conn. 702 (1963). The legislative intent was to deny the landlord the fruits of his illegal activity, and therefore it would be inconsistent with the principles of the law for it to be said that the landlord may not sue the tenant for rent but he may evict him for not paying that which is not legally due. The tenant's reward for the exercise of his legal right will be a swift and certain eviction from his home, and the landlord will immediately replace him with another who may well pay.

In either case, it is no defense for the plaintiff to claim that the building meets all the qualifications of the tenement house law. That argument was presented to the court, and rejected, in *Loftus* v. *Second Nat. Bk. of New Haven*, 121 Conn. 454 (1936). The court there stated that there sole question upon which the issue should be decided is the existance or non-existance of the certificate provided for by section 10-370.

The Connecticut statute was copied directly from the New York TENEMENT HOUSE LAW (now the MULTIPLE DWELLINGS LAW) and the cases there support this proposition. In one case the court held that rent was due if there were a certificate, even if it had been improperly obtained, and the building in fact did not comply with

the law. *Central Park Plaza Corp. v. Moisky*, 145 Misc. 688; 260 N.Y.S. 902 (Mun. Ct. City of N.Y. 1932).

The plaintiff may also claim that the Certificate of Occupancy issued by the West Haven Building Department is the equivilant of a tenement house certificate. This contention cannot be sustained. The clear requirement of section 19-370 Conn. Gen. Stat. is that the certificate state "that such building conforms in all respects with the requirements of this part." The West Haven certificate says nothing of the sort, is certainly not a form provided by the state labor commissioner § 19-875 C.G.S. and therefore it is for the purposes of this special defense, of no effect. *Loftus v. Second Nat. Bk. of New Haven*, 121 Conn. 454 (1936).

This Court is respectfully requested to take judicial notice of the official form of tenement house certificate issued in this State which does comply with the provisions of § 19-370 as it appears in Connecticut Supreme Court Records and Briefs, Vol. A-91 part 3, p. 181 (May term 1936), a copy of which is attached hereto. The Court may take such judicial notice under the authority of *Guerriero v. Galasso*, 144 Conn. 600 (1957) and *Gen. Hospital Soc. v. New Haven County*, 127 Conn. 53, 59 (1940) (judicial notice of printed documents issued by official).

The plaintiff, therefore, may not now sue the defendants for their eviction on the basis of non-payment of rent.

F. *The Plaintiff May Not Bring This Action As It Has Never Made Demand Upon the Defendants for the Rent Claimed to Be Due.*

At common law a demand for rent was the prerequisite for a forfeiture of an estate. In Connecticut, demand is prerequisite to the maintenance of a summary process for nonpayment. *Bowman v. Foot*, 29 Conn. 331, 341 (1860); *Sun Oil Co. v. Keane*, 2 Conn. Cir. 524, 528 (App. Div. Cir. Ct. 1964). The right to a demand for rent may be waived but this must be by clear terms in the lease, and such a waiver is strictly construed against the landlord. *Korner v. Dubin*, 104 Conn. 112 (1926);

Carry v. *Scott*, 47 Conn. 366, 375 (1879). There has been no waiver of demand in this case, nor does the plaintiff plead any such waiver.

Respectfully submitted

FRANCIS X. DINEEN
Attorney for the defendants,
Appearing Specially

DEPARTMENT OF BUILDINGS
Room No. 9, City Hall
TENEMENT HOUSE CERTIFICATE

New Haven, Conn. .....

THIS IS TO CERTIFY that the building located at

.....

owned by .....
for which permit No. was issued on 19
conforms in all respects to the TENEMENT HOUSE ACT and may from this date be occupied for human habitation.

.....
Building Inspector

Inspected by .....

No. 496

* * * *

EXHIBIT 3 TO MOTION TO REVIEW

[Memorandum of Decision Omitted.
Printed side page ~~53~~ 5 ante]

EXHIBIT 4 TO MOTION TO REVIEW

[Motion to Waive Surety Bond on Appeal Omitted.
Printed side page ~~61~~ 10 ante]

EXHIBIT 5 TO MOTION TO REVIEW

[Memorandum of Decision on Motion to Waive
Surety Bond on Appeal Omitted.
Printed side page ~~68~~ 23 ante]

IN THE EIGHTH CIRCUIT COURT
APPELLATE DIVISION

CV-8-677-5985

[Title Omitted]

MOTION TO DISMISS APPEAL—January 23, 1968

In compliance with Sections 1023 and 697 of the Connecticut Practice Book (1963), the plaintiff herein respectfully moves that the defendants' appeal be dismissed for non-compliance with the mandatory surety requirement of Section 52-542 of the Connecticut General Statutes.

The Plaintiff,
West Haven Housing Authority

By: PHILBIN, DONAHUE & VOTTO

/s/ E. Michael Heffernan
E. MICHAEL HEFFERNAN
Its Attorney

[Order Omitted in printing]

[Certification Omitted in printing]

IN THE EIGHTH CIRCUIT COURT
WEST HAVEN, CONNECTICUT

CV 8-677-5985

WEST HAVEN HOUSING AUTHORITY

vs.

RECTOR SIMMONS, JR. ET UX

ORDER—February 29, 1968

In connection with this case an application was made to the United States District Court claiming injunctive relief against certain court officials and against the plaintiff. As a result of such application to the United States Court a conference was held in the chambers of Judge Robert Zampano, United States District Judge, at which conference the interested parties and/or their attorneys were present. It was the opinion of the United States District Judge, as set forth in this file, that the problems presented by the application for an injunction should be litigated to a conclusion in the State Courts and that in lieu of a compliance with the statute that requires a surety bond when an appeal is taken in certain aspects of our summary process law, the United States Court ordered that the defendant pay the sum of seventy-two dollars into the registry of the United States Court and that said sum and such other sums as are paid into the United States District Court in connection with this particular proceeding are to be transmitted to the Clerk of the Circuit Court of the State of Connecticut in the Eighth Circuit for deposit by him pending the ultimate disposition of this case in the State Courts.

Pursuant to the order of the United States District Court I hereby direct that Mr. Serafino Ginnetti, Clerk of the Eighth Circuit, upon receiving the sum of seventy-two dollars and upon receiving any further sums in connection with the order of the United States Court, that he deposit said amounts, clearly earmarked, in the bond account of the Eighth Circuit and hold said sums in said account until further order of this Court.

/s/ DiCenzo
J.

IN THE APPELLATE DIVISION OF THE CIRCUIT COURT, CONNECTICUT

Date of Judgment March 1, 1968

Decision Announced March 7, 1968

File No. CV 8-677-5985 AP

WEST HAVEN HOUSING AUTHORITY

v.

RECTOR SIMMONS, JR. ET AL.

Argued February 19, 1968 Decided March 1, 1968

Motion by the defendants for review of the action of the trial court, *DiCenzo, J.*, in denying their application for a waiver of security in an appeal from a judgment in a summary process action in the Circuit Court in the eighth circuit. *Motion denied; appeal dismissed.*

Francis X. Dineen, of New Haven, for the appellants (defendants).

Dennis J. Donahue, Jr. and *E. Michael Heffernan*, of West Haven, for the appellee (plaintiff).

OPINION

JACOBS, J. The complaint in this summary process action alleged these facts: The defendants entered into possession of the leased premises on the first day of November, 1966, under a written lease, for the term of one month, renewable for successive terms of one month each, at a monthly rental of $72, payable in advance, on the first day of each month. On July 12, 1967, the plaintiff gave the defendants the statutory notice that they were to quit possession of the premises on or before July 18, 1967, for failure to pay the rent due for the months of May, June and July, 1967.

After the filing of the summary process action, a succession of pleadings followed; and, on December 4, 1967,

the court (*DiCenzo, J.*) ordered the pleadings closed within one week from the aforesaid date. The defendant complied with the order of court. A hearing was held on the merits on January 16, 1968. Judgment was rendered for the plaintiff to recover possession of the premises described in the complaint upon the ground of nonpayment of the rent.

Upon the taking of an appeal, the defendants filed an application in the trial court for waiver of surety on appeal upon the ground of defendants' indigency and attached an affidavit to the motion showing the defendants' financial condition.

On January 19, 1968, the trial court held a special hearing on the defendants' application for waiver of security on appeal. The court found that no rent had been paid since May 1, 1967, nor had the defendants offered to pay any part of the rent due; that the record contained "dilatory tactics, and [was] loaded with defenses interposed to delay and obstruct the summary process action"; and that the "appeal is being taken for the purpose of delay." Accordingly, the court denied the application for waiver of security on appeal.

"With the establishment of the circuit court in 1959, the statute providing for the review of judgments of summary process by writ of error was repealed. Gen. Stat., 1959 Sup., § 52-274. Jurisdiction of summary process is now vested in the circuit court; Gen. Stat., 1959 Sup., . . . § 52-2a; it is reviewable as in any other of its judgments." Maltbie, Conn. App. Proc. (1961 Sup.) § 241; see Rubinow, "Circuit Court Civil Jurisdiction and Procedure" in Stephenson, Conn. Civil Proc. (1966 Sup.) § 191e. "The right to an appeal is not a constitutional one, nor one based upon principles of natural justice. It is but a statutory privilege which an aggrieved party has the right to avail himself of only when he has strictly complied with the provisions of the statutes and rules upon which the privilege is granted." *Bronson* v. *Mechanics Bank*, 83 Conn. 128, 133; see *Bennett* v. *United Lumber and Supply Co.*, 110 Conn. 536, 538. "An appeal in this state is a statutory privilege accorded only if the conditions fixed by the statutes and rules of court for taking and prosecuting

it are complied with." *Kennedy* v. *Walker*, 135 Conn. 262, 266. "Under its general authority to regulate appellate procedure the legislature has the power to require the giving of a bond or undertaking as a condition precedent to the right to appeal or sue or a writ of error, unless such power is clearly excluded by the constitution. Such statutes do not violate constitutional provisions granting the right of appeal, as they do not restrict or deny the right, but merely regulate the manner of exercising it, . . ." 4A C.J.S., Appeal and Error, § 502(b), p. 208. "The statutes [relating to summary process actions] almost invariably authorize an appeal by the person against whom the judgment is given in the proceeding, such appeal being effective to stay the execution of a judgment of dispossession only in case the appellant gives a bond or undertaking sufficient to satisfy any damage to the plaintiff caused by the continued withholding of possession." 2 Tiffany, Landlord and Tenant (1912 Ed.) § 284, p. 1805; see 52 C.J.S., Landlord and Tenant, § 784(a); *Pollack* v. *Ro-An of New England, Inc.*, 1 Conn. Cir. Ct. 173, 174. Thus, it is left to the legislature to provide the manner of taking an appeal and the legislature has undoubtedly the power to provide such requirements and attach such conditions as are necessary to protect the adverse party.

Section 52-542 of the General Statutes, as amended by Public Act 509, § 4 (1961), provides that "[w]hen any appeal is taken by the defendant in an action of summary process, he shall give a sufficient bond with surety to the adverse party, to answer for all rents that may accrue . . . ." A sufficient bond with surety is essential to a valid appeal; see *Palmer* v. *Des Reis*, 136 Conn. 627, 630; and "is solely for the protection of the appellee." *Palmer* v. *Des Reis*, 135 Conn. 388, 389.

The defendants insist that the statutory requirement of a bond with surety as a condition procedent to the appeal as applied to them unconstitutionally discriminates against them as indigent defendants in violation of the Equal Protection Clause of the United States Constitution and Article I, § 10 of the Constitution of Connecticut (1965).

It would certainly require strong authority to induce us to come to the result as is claimed by the defendants.

The defendants rely upon a dissenting opinion by Mr. Justice Douglas, with whom the Chief Justice concurred, from the denial of the grant of certiorari, in *Williams* v. *Shaffer*, 385 U.S. 1037, 87 Sup. Ct. 772, 17 L.Ed. 683. In that case, the petitioners were unable due to indigency to furnish the security bond required by Ga. Code Ann. (1966) § 61-304. The Supreme Court of Georgia held that the question involved was moot; the appeal was dismissed because the petitioners had been evicted. *Williams* v. *Shaffer*, 222 Ga. 334, 149 S.E. 2d 668. Mr. Justice Douglas characterized Georgia's summary eviction statutes; Ga. Code Ann. (1966) §§ 61-301 through 61-305; as providing (p. 1037) "a very swift, expedient manner" by which a landlord may oust a tenant. But Georgia's summary process statutes differ radically from ours. Under Ga. Code Ann. (1966) § 61-301, the landlord files with a judge of the superior court or justice of the peace an affidavit that the tenant has held over or has failed to pay the rent; the judge thereupon issues a dispossessory warrant ordering the sheriff to evict the tenant and his possessions. Ga. Code Ann. (1966) § 61-302; see *Huff* v. *Markham*, 70 Ga. 284, 288; *Hicks* v. *Beacham*, 131 Ga. 89, 92, 62 S.E. 45, *Carter* v. *Sutton*, 147 Ga. 496, 94 S.E. 760; *Shehand* v. *Eberhart*, 30 Ga. App. 265, 266, 117 S.E. 675. The tenant may arrest the proceedings and prevent his summary eviction by filing a counteraffidavit denying the landlord's allegations (Ga. Code Ann. (1966) § 61-303) and thereby obtain a jury trial on the facts in issue. Ga. Code Ann. (1966) § 61-304. "The bond and security must be given before the tenant can resist the warrant by counter-affidavit." *Realty Management, Inc.* v. *Keith*, 114 Ga. App. 317, 151 S.E. 2d 189. And where the issues specified in § 61-304 are decided adversely to the tenant, he is liable for double the rent reserved or stipulated. Ga. Code Ann. (1966) § 61-305; see *Stanley* v. *Stembridge*, 140 Ga. 750, 754, 79 S.E. 842; *Sims* v. *Shotkin*, 70 Ga. App. 68, 71, 27 S.E. 2d 466; *Gaultner* v. *Adamson*, 75 Ga. App. 406, 408, 43 S.E. 2d 778. It may well be true that in Georgia an indigent tenant may be deprived of his shelter, and the life of his family disrupted—all without a hearing—solely because of his poverty. Surely it cannot be said that these defendants were denied a full

and plenary hearing on the merits. And when we take a look at the record this case, we would be hard put to say that the defendants lacked the economic power to make themselves heard in a court of law, indeed, seldom in our experience with summary process actions had tenants received such zealous and vigorous advocacy of their rights as reflected by the record and briefs which comprise some 140 typewritten pages. "This Court of course does not sit to cure social ills that beset the country." *Williams* v. *Shaffer*, 385 U.S. 1037, 1041, 87 Sup. Ct. 772, 17 L.Ed. 2d 683.

Roberts v. *LaVallee*, 389 U.S. 40, 88 Sup. 194, 19 L.Ed. 2d 41, also cited by the defendants, is distinguishable on the facts. The petitioner was indigent. He was charged with multiple offenses: robbery, larceny and assault. At trial he asked the court to furnish him, at state expense, with minutes of a prior preliminary hearing, at which the major state witnesses had testified. His request was denied. The petitioner was convicted of the crimes charged and sentenced to a term of 15-20 years in prison. It was in that context that the court said (p. 42): "Our decisions for more than a decade now have made clear that differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution."

The defendants here had an obvious choice; they could have relinquished possession or, if they wanted to take an appeal, to give sufficient bond with surety. See *Horn* v. *Blackwell*, 212 S.C. 480, 484, 48 S.E. 2d 322; *Stoler* v. *Fraternal Order of Beavers*, 171 Pa. Super. 170, 172, 190 A.2d 304, *Hier* v. *Anheuser-Busch Brewing Assn.*, 52 Neb. 144, 145, 71 N.W. 1005.

We fail to see that the statute under attack (§ 52-542) violates constitutional precepts.

Want of bond with surety, where bond with surety is by statute a prerequisite of review, furnishes a sufficient ground of dismissal of the appeal.

The motion for review is denied; the appeal is dismissed.

In this opinion KOSICKI and DEARINGTON, Js., concurred.

The foregoing is a true copy of the final opinion as filed with the Chief Clerk of the Circuit Court, but the opinion is subject to change by the Judges only in matters of form and then only with the approval of the Reporter of Judicial Decisions.

/s/ Elliott R. Katz
ELLIOTT R. KATZ,
Chief Clerk

IN THE APPELLATE DIVISION
OF THE CIRCUIT COURT
STATE OF CONNECTICUT

CV 8-677-5985 AP

WEST HAVEN HOUSING AUTHORITY

vs.

RECTOR SIMMONS JR. ET AL.

On Appeal From Circuit Court, Eighth Circuit

JUDGMENT—February 19, 1968

This appeal by the defendants from the judgment of said Circuit Court, Eighth Circuit was taken on the 18th day of January, 1968 accompanied by a Motion to Waive Surety Bond, required by Section 52-542 of the General Statutes when an appeal is taken by the defendant in a summary process action, from a judgment for possession of the premises is rendered for the plaintiff. The Motion to Waive Surety Bond was dismissed by the Court (DiCenzo, J.) on January 19, 1968 and on the 24th day of January, 1968, the appellants filed their Motion to Review and Vacate the Action of the Court in denying the defendant's Motion to Waive Surety Bond on Appeal and in finding that the defendants appeal is taken for the purpose of delay. On the 25th day of January, 1968, the appellee filed a Motion to Dismiss the Appeal for failure to file such surety bond as may appear in the record on file in said court. Said Motion to Review and said Motion to Dismiss Appeal came to the session of the Appellate Division on February 19, 1968 when the parties appeared.

This Court, having heard the parties, finds that want of bond with surety, where bond with surety is by statute a prerequisite of review, furnishes a sufficient ground of dismissal of the appeal.

It is therefore considered and adjudged that the Motion to Review is denied and that the Motion to Dismiss the Appeal is granted; the appeal is dismissed.

Judgment entered March 1, 1968.

By the Court,

/s/ Serafino Ginnetti
SERAFINO GINNETTI, Clerk

IN THE EIGHTH CIRCUIT COURT
WEST HAVEN, CONN.

CV-8-677-5985 AP

WEST HAVEN HOUSING AUTHORITY

vs.

RECTOR SIMMONS, JR. & ROSE SIMMONS

MOTION TO TERMINATE STAY OF EXECUTION—
March 15, 1968

The Plaintiff, West Haven Housing Authority, respectfully moves, pursuant to Section #744 of the Practice Book (1963) that the presiding judge of the Appellate Panel, (Kosicki, J.) terminate the defendants' Stay of Execution, provide for in said section, in the above-entitled matter, in that the certification proceedings taken by the defendants are only for delay, and/or the due administration of justice requires that said Stay of Execution be terminated.

THE PLAINTIFF,

WEST HAVEN HOUSING AUTHORITY

BY: PHILBIN, DONAHUE & VOTTO

/s/ Dennis J. Donahue, Jr.
DENNIS J. DONAHUE, JR.
Its Attorney

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IN THE
SUPREME COURT OF CONNECTICUT

CV 8-677-5985 AP

WEST HAVEN HOUSING AUTHORITY

vs.

RECTOR SIMMONS JR. ET AL.

PETITION FOR CERTIFICATION BY SUPREME COURT

* * * *

QUESTIONS PRESENTED

1. Whether the provision of section 52-542 of the Connecticut General Statutes requiring defendants to provide a surety bond on appeal is unconstitutional in violation of the due process and equal protection provisions of the Fourteenth Amendment to the Constitution of the United States of America, as well as the provision of Article I Section 10, of the Constitution of the State of Connecticut.

2. Whether a motion for Review lies to review the decision of the trial judge in which a finding is made that the appeal is taken for the purpose of delay.

3. Whether a motion for Review effects a Stay of Execution pending a decision thereon.

4. Whether the provision of § 52-542 of the Connecticut General Statutes permitting the trial judge to find that the appeal is taken for the purpose of delay thereby precluding a stay of execution pending appeal is unconstitutional in violation of the due process and equal protection provisions of the Fourteenth Amendment to the Constitution of the United States in that the statute makes no provision for notice and hearing prior to the making of such a finding, in that the statute sets up an arbitrary and unreasonable standard to be applied by the trial judge and in that the effect of the statute is to permit the trial judge to prevent an effective appellate review of his own rulings and decision at the trial.

5. Whether the action of the trial judge in finding that the appeal in this case was taken for the purpose of delay was arbitrary, unreasonable and without basis in the record, in violation of the due process and equal protection provisions of the Fourteenth Amendment to the Constitution of the United States of America.

IN THE APPELLATE DIVISION
CIRCUIT COURT, EIGHTH CIRCUIT

CV 8-677-5985 AP

WEST HAVEN HOUSING AUTHORITY

vs.

RECTOR SIMMONS JR. ET AL.

SUPPLEMENTARY JUDGMENT—May 16, 1968

On March 11, 1968, the defendant filed a Petition for Certification from the judgment of the Appellate Division denying the defendant's Motion for Review and dismissing the defendant's appeal from the judgment entered by the Circuit Court, Eighth Circuit.

On March 15, 1968, the plaintiff filed a Motion for an Order Terminating the Stay of Execution pending the appeal to the Supreme Court and at a special session of the Appellate Division of the Circuit Court held on April 1, 1968 a hearing was held before the presiding judge, Kosicki, P.J., the hearing being limited to the plaintiff's Motion for Termination of the Stay of Execution. Jacobs, J. and Dearington, J. were also present. The presiding judge and the court having heard the parties, granted the plaintiff's Motion for an Order Terminating a Stay of Execution.

It is therefore considered and adjudged that the Plaintiff's Motion for an Order Terminating a Stay of Execution must be and the same is hereby granted; this order shall not become effective until five days after receipt of this order.

Judgment entered April 11, 1968.

Decision announced April 18, 1968.

By the Court,

/s/ Serafino Ginnetti
SERAFINO GINNETTI, Clerk

IN THE APPELLATE DIVISION OF THE CIRCUIT COURT, CONNECTICUT

Date of Judgment April 11, 1968

Decision Announced April 18, 1968

File No. CV 8-677-5985 AP

WEST HAVEN HOUSING AUTHORITY

v.

RECTOR SIMMONS JR. ET AL.

Argued April 1, 1968 Decided April 11, 1968

Motion by the plaintiff for an order terminating a stay of execution on appeal from a judgment in a summary process action in the Circuit Court in the eighth circuit. *Motion granted.*

Francis X. Dineen, of New Haven, for the appellants (defendants).

E. Michael Heffernan, of West Haven, for the appellee (plaintiffs).

ORDER. This is a motion made pursuant to the provisions of Practice Book § 744 to terminate a stay of execution on appeal from a judgment in a summary process action upon the ground that the certificaton proceedings (Practice Book § 743) were taken by the defendants only for delay and that the due administration of justice requires such termination.

At a special session of the Appellate Division held on April 1, 1968, (Kosicki, P.J.), the hearing was limited to plaintiff's motion for termination of stay of execution.

At the outset, we make this observation. "It has always been the policy of our law to limit the issues in an action of summary process to a few simple ones within the express scope of the statutory provisions." *Webb* v. *Ambler*, 125 Conn. 543, 550. "The action of summary process is a special, statutory remedy to enable landlords to obtain possession of leased premises without suffering

the delay, loss and expense to which, under the common-law actions, they might be subjected by tenants wrongfully holding over their terms. 1 Swift's Dig., s.p. 511. 'The proceeding was not only intended to be summary, but conclusive.'" *Marsh* v. *Burnhans*, 79 Conn. 306, 308; see *Atlantic Refining Co.* v. *O'Keefe*, 131 Conn. 528, 530; *Proch* v. *Decho*, 134 Conn. 649, 651; Greenberg, The Action of Summary Process, 33 Conn. B.J. 62, 69.

We briefly review the proceedings in the court below. The summary process action was made returnable before the Circuit Court in the eighth circuit on the fourth Tuesday of July, 1967. After the filing of the action, the defendants pleaded in abatement to which the plaintiff filed a demurrer. The court (*Kinmonth, J.*) sustained the demurrer. On August 21, 1967, the defendants filed two motions: one for more specific statement (Practice Book § 99), and the other for over (Practice Book § 103). These motions were granted by the court (*Macdonald, J.*). The plaintiff complied with the order of the court. On August 24, 1967, the plaintiff filed a motion for judgment by default for failure to plead which was followed by defendants' objections to the motion. The court (*Wise, J.*) sustained defendants' objections "by agreement of counsel." Thereafter, the defendants filed a second demurrer on the ground that the complaint, which alleged a written lease, failed to allege a valid termination of the lease. The court (*Adorno, J.*) overruled the demurrer. Additional motions were presented to the court (*Sullivan, J.*); finally, on December 7, 1967, the court (*DiCenzo, J.*) ordered the defendants to file an answer. The answer contained some admissions and denials and alleged seven special defenses. The case was fully tried on the merits on January 9, 1968. On January 16, 1968, the court (*DiCenzo, J.*) rendered judgment for the plaintiff upon the ground of nonpayment of the rent.

The defendants appealed from the judgment. In connection with the appeal, they filed an application in the trial court for waiver of surety on appeal upon the ground of indigency.

On January 19, 1968, the trial court held a special hearing on defendants' application for waiver of security

on appeal. In its memorandum of decision, the court made these findings: "(1) the defendants have paid no rent since May 1, 1967, nor offered to pay any part of the rent due; (2) the record in the case is full of dilatory tactics, and is loaded with defenses interposed to delay and obstruct the summary process proceeding; (3) the instant motion is another effort to avoid the clear obligation required by § 52-542 . . . of the General Statutes, requiring the furnishing of a sufficient bond with surety to the plaintiff to answer for all rents which may accrue; and (4) it clearly appears to this court [*DiCenzo, J.*], having tried this case, that this appeal is being taken for the purpose of delay." Accordingly, the court denied the application for waiver of surety on appeal as required by the statute. Thereafter, the defendants filed in this court a motion for review of the action of the trial court in the denial of the application.

On March 1, 1968, in *West Haven Housing Authority* v. *Simmons*, Conn. Cir. Ct. , 8 App. Div. No. 14, we held that the statute under attack, § 52-542, was not violative of constitutional precepts; and we further held that "[w]ant of bond with surety, where bond with surety is by statute a prerequisite of review, furnishes a sufficient ground of dismissal of the appeal." Id., p. 6. We denied the motion for review and dismissed the appeal.

Appeals for delay and frivolous appeals have given trouble from the beginning." Pound, "Appellate Procedure in Civil Cases" (1941 Ed.) 31. "The authorities are numerous that where a writ of error is brought for the purpose of delay it does not superseded the execution": *Brewster* v. *Cowen*, 55 Conn. 152, 156; so in the statute (§ 52-542), with regard to summary process for obtaining possession of leased premises, it is provided that the defendant may have five days after judgment in which to take an appeal, and that "execution shall be stayed until the final determination of the cause, unless it appears to the judge who tried the case that the appeal was taken for the purpose of delay." "A supersedeas or stay will not issue unless it is necessary to presere the rights of the parties pending determination of the appeal; nor will it be granted where it appears that the appeal . . . is

merely for the purpose of delay; . . . . Further, a supersedeas or stay will not be granted . . . where the supersedeas or stay may defeat the ends of justice or result in irreparable or disproportionate injury to the appellee; . . . where the damages which may result from the supersedeas or stay is of such a character that it cannot be compensated in money, so that the appellee will not be protected by the bond in case of affirmance; . . . where appellant has not executed the bond or undertaking required by law or a sufficient bond or undertaking . . . ." 4A C.J.S., Appeal & Error, § 636, p. 454; see 5 Am. Jur. 2d, Appeal and Error, § 912; *People* v. *Jackson*, 190 Cal. 257, 261, 212 Pac. 4; *Application of Mott*, 123 N.Y. Sup. 2d 603; *Sartin* v. *Barlow*, 196 Miss. 159, 168, 16 So. 2d 372.

In the interpretation of Practice Book § 744, the controlling consideration is that it provides for a termination of stay "if the presiding judge of the appellate panel which heard the case is of the opinion that the certification proceedings have been taken only for delay or that the due administration of justice requires him to do so, he may, up to the time . . . [the Supreme Court] acts upon the petition, upon motion and hearing, order that the stay be terminated." See *Northeastern Gas Transmission Co.* v. *Benedict*, 139 Conn. 36, 39; *Muti* v. *Collins*, 24 Conn. Sup. 455, 456.

We have before us the entire file in the case. As we noted in *West Haven Housing Authority* v. *Simmons*, supra, the record and briefs in this case comprise some 140 typewritten pages. Upon a review of the whole matter, we are satisfied that Judge DiCenzo was justified in concluding "that this appeal is being taken for the purpose of delay."

Therefore, the plaintiff's motion for an order terminating a stay of execution must be and the same is hereby granted; this order shall not become effective until five days after receipt of this order.

KOSICKI, Presiding Judge.

In this opinion KOSICKI, DEARINGTON and JACOBS, Js., concurred.

The foregoing is a true copy of the final opinion as filed with the Chief Clerk of the Circuit Court, but the opinion is subject to change by the Judges only in matters of form and then only with the approval of the Reporter of Judicial Decisions.

/s/ Elliott R. Katz
ELLIOTT R. KATZ,
Chief Clerk

IN THE SUPREME COURT

CV8—677—5985 AP

WEST HAVEN HOUSING AUTHORITY

vs.

RECTOR SIMMONS JR. ET AL.

ORDER DENYING CERTIFICATION—June 25, 1968

The defendants having filed a petition for certification and the court having considered said petition finds that it should be denied.

Whereupon it is ordered that said petition be and it hereby is denied.

BY THE COURT

/s/ DOMINIC A. DICORLETO,
Clerk

IN THE EIGHTH CIRCUIT COURT
APPELLATE DIVISION

CV8-677-5985 AP

[Title Omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—June 27, 1968

I. Notice is hereby given that Rector Simmons, Jr., and Rose Simmons, the appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of this Court denying their motion to review and dismissing their appeal, entered on March 1, 1968, certification of the Supreme Court of Connecticut having been denied on June 25, 1968.

This appeal is taken pursuant to Title 28 U.S.C. Section 1257(2).

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in such transcript all papers and materials now in the possession of the clerk, and transcripts of the trial and of all subsequent proceedings as taken by the court reporter.

III. The following questions are presented by this appeal:

(a) Whether the provision of section 52-542 of the Connecticut General Statutes requiring defendants to provide a surety bond on appeal is unconstitutional in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States of America, in that it effects an invidious discrimination on the basis of wealth of those financially unable to post a surety bond.

(b) Whether the provision of section 52-542 of the Connecticut General Statutes permitting the trial judge to find that an appeal is taken for the purpose of delay thereby precluding a stay of execution pending appeal is unconstitutional in violation of the due process and equal protection provisions of the Fourteenth Amendment to the

Constitution of the United States of America in that the statute makes no provision for notice and hearing prior to the making of such a finding, in that the statute sets up an arbitrary and unreasonable standard to be applied by the trial judge and in that the effect of the statute is to permit the trial judge to prevent an effective appellate review of his own rulings and decision at trial.

(c) Whether the action of the trial judge in finding that the appeal in this case was taken for the purpose of delay was arbitrary, unreasonable, capricious and without basis in the record, in violation of the due process and equal protection provisions of the Fourteenth Amendment to the Constitution of the United States of America.

/s/ Francis X. Dineen
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[Proof of Service Omitted in Printing]

SUPREME COURT OF THE UNITED STATES

No. 909 Misc., October Term, 1968

RECTOR SIMMONS, JR., ET UX., APPELLANTS

v.

WEST HAVEN HOUSING AUTHORITY

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

April 7, 1969

'74.

SUPREME COURT OF THE UNITED STATES

No. 909 Misc., October Term, 1968

RECTOR SIMMONS, JR., ET UX., APPELLANTS

v.

WEST HAVEN HOUSING AUTHORITY

APPEAL from the Appellate Division of the Circuit Court of the State of Connecticut.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The case is transferred to the appellate docket as No. 1232 and placed on the summary calendar.

April 7, 1969

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